13

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 722.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, AND THE FEDERAL SUGAR REFINING COMPANY, APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED JULY 14, 1911.

(22798)

SUPREME COURT OF THE UNITED STATES.

October Term, 1911.

No. 722.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, AND THE FEDERAL SUGAR REFINING COMPANY, APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

INDEX.

2096—11——1

a THE UNITED STATES OF AMERICA, *ss:*

At a Commerce Court of the United States begun and held in the city of Washington, District of Columbia, on the 17th day of May, A. D. 1911:

Present: Honorable Martin A. Knapp, presiding judge: Honorable Robert W. Archbald, Honorable William H. Hunt, Honorable John E. Carland, Honorable Julian W. Mack, judges: Blackburn Esterline, Esq., special assistant to the Attorney General; F. Jerome Starek, Esq., marshal; George F. Snyder, clerk.

Among other were the following proceedings, to wit:

No. 38.

The Baltimore & Ohio Railroad Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and The Pennsylvania Railroad Company, petitioners; and John Arbuckle and William A. Jamison and Brooklyn Eastern District Terminal, intervening petitioners, *vs.* United States, respondent, and Interstate Commerce Commission and Federal Sugar Refining Company, intervening respondents.

b *Appearances.*

Hugh L. Bond, jr., Esq.; Jackson E. Reynolds, Esq.; W. S. Jenney, Esq.; George F. Brownell, Esq.; J. F. Schaperkotter, Esq.; John B. Kerr, Esq.; and George Stuart Patterson, Esq., solicitors for the petitioners.

James A. Fowler, Esq., and Blackburn Esterline, Esq., solicitors for the United States.

P. J. Farrell, Esq., solicitor for the Interstate Commerce Commission.

Parsons, Closson and McIlvaine, solicitors for Brooklyn Eastern District Terminal.

Dykman, Oeland and Kuhn, solicitors for John Arbuckle and William A. Jamison.

Ernest A. Bigelow, Esq., solicitor for Federal Sugar Refining Company.

Be it remembered that on the 12th day of April, 1911, came the petitioners in the above-entitled cause, by their solicitors, and filed in the clerk's office of said court their certain petition for injunction

and exhibits accompanying said petition, which said petition and exhibits are in the words and figures following, to wit:

1 In the Commerce Court of the United States.

Petition for injunction, etc.

THE BALTIMORE AND OHIO RAILROAD Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario and Western Railway Company; and The Pennsylvania Railroad Company, petitioners,
v.
UNITED STATES, RESPONDENT.

May session, 1911. No. 38.

To the Judges of the Commerce Court of the United States:

The Baltimore and Ohio Railroad Company, a corporation of the State of Maryland; The Central Railroad Company of New Jersey, a corporation of the State of New Jersey; The Delaware,
2 Lackawanna and Western Railroad Company, a corporation of the State of Pennsylvania; the Erie Railroad Company, a corporation of the State of New York; the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania; the New York, Ontario and Western Railway Company, a corporation of the State of New York; and The Pensylvania Railroad Company, a corporation of the State of Pennsylvania, bring this, their petition for an injunction against the enforcement of and a decree setting aside and annulling a certain order of the Interstate Commerce Commission, made on the fifth day of December, 1910, and more particularly mentioned hereinafter, and thereupon your petitioners complain and say:

1. That your petitioners are engaged in the transportation of passengers and property by railroad from one State to another and in respect of such transportation are therefore subject to the various acts enacted by the Congress of the United States regulating and affecting interstate transportation of the character mentioned in said acts, in so far as those acts are not repugnant to the Constitution of the United States and therefore invalid.

2. That the Interstate Commerce Commission is a commission created and established by and which now exists under and by virtue of an act of Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, and various other acts amendatory thereof and supplementary thereto.

3. That your petitioners' railroads all have their rail termini upon the New Jersey shore of the harbor of New York, except the Baltimore & Ohio Railroad Company, whose rail terminus is at St.

3 George, Staten Island, and the Pennsylvania Railroad Company, whose rail terminus for passenger traffic only is in the borough of Manhattan. In order to reach the shipping territory of Greater New York across the Hudson and East Rivers and other waters, your petitioners have been compelled to serve the vast shipping interests of Greater New York City by means of floats, lighters, and barges.

Your petitioners have established a lighterage zone (known as the lighterage limits), which has been in effect for several years, and during that time has been and is now described in the tariffs of each of your petitioners, which tariffs have been and are duly filed with the Interstate Commerce Commission, as follows:

North River: New York side, Battery to 135th Street; New Jersey side, Jersey City, N. J., to and including Fort Lee, N. J.

East River and Harlem River: New York side, Battery to Jerome Avenue Bridge, including Harlem River side of Wards and Randalls Islands; Brooklyn side, from Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal west of Washington Avenue Bridge, and to Hamilton Avenue Bridge, Gowanus Canal, to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay: Points on North and East shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and include Shooter Island; points on the New Jersey shore of New York Bay and on the Kill von Kull, between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, Staten Island.

4 Within said lighterage limits your petitioners perform without additional charge a lighterage service on eastbound shipments from their rail terminals upon the western shore of New York Harbor to points within those limits, and on westbound shipments from points within those limits to their rail terminals upon the western shore of New York Harbor.

Within said lighterage limits and at various points within the boroughs of Manhattan and Brooklyn, city of New York, each of your petitioners has established, and for several years has maintained and still maintains freight terminal stations, at which it delivers eastbound freight and receives westbound freight for transportation over its lines. Each of your petitioners has some freight terminal stations as aforesaid which it owns and directly operates, and others which are operated for it under and pursuant to the provisions of certain contracts between it and the owners of said terminal stations. In some instances a single terminal station is operated for and on behalf of two or more of your petitioners under and pursuant to several contracts between them and the owner of said station; and in such instances said terminal station is a union terminal for two or more of your petitioners.

It is impossible for your petitioners to deliver and receive all freight, especially carload freight at said terminals. A large part

of it must of necessity be delivered and received at public and private docks within the said lighterage limits. Accordingly your petitioners have for several years received and delivered freight at all steamship piers, docks, or landings, and private piers or landings when shippers or consignees arrange for the receipt or delivery of freight, within the lighterage limits and have lightered it
5 without additional charge from and to said points, and still do so receive, deliver, and lighter it.

Your petitioners transport, between said terminal stations, piers, docks, and landings and their rail terminals on the western shore of New York Harbor, as a part of the transportation service from the points of shipment to the point of destination, and for the flat New York rate, by means of lighters, floats, and barges, owned and directly operated by them or operated for them under contracts between them and the owners of such equipment, freight received at or destined to said terminal stations, piers, docks, and landings. Your petitioners for several years past have held and now hold themselves out as common carriers to and from all said points within the lighterage limits, both by their practice of receiving and delivering freight at said points and by their tariffs, which are now and for several years past have been duly published and filed with the Interstate Commerce Commission. The liability under their respective bills of lading attaches to your petitioners on westbound shipments from the time the freight is received at such terminal station, dock, pier, or landing and ends on eastbound shipments when delivered into the hands of the consignee at such terminal station, pier, dock, or landing. The bill of lading issued by your petitioners for freight so received or delivered by them by its terms covers and includes the lighterage movement.

4. Among other terminal freight stations established by your petitioners within the said lighterage limits is the Jay Street Terminal.

The Jay Street Terminal is located at the foot of Bridge Street, Brooklyn, on the East River, having a water frontage of 1,200 feet and a depth of 600 feet. Its equipment consists of a large
6 freight house, two Baldwin locomotives, three tug boats, two steam lighters, eleven barges, and nine car floats. The capacity of the yard is 235 cars.

The Jay Street Terminal is a union freight terminal for all your petitioners and is designated as a regular public freight terminal of your petitioners in their tariffs duly filed with the Interstate Commerce Commission. It is owned by a copartnership composed of William A. Jamison and John Arbuckle, conducting such freight terminal as a separate business under the name and style of Jay Street Terminal, under certificate filed with the clerk of New York County in accordance with the law of the State of New York, and is operated as a freight station for your petitioners under and pursuant to several contracts between your petitioners and the Jay Street Terminal, which contracts are substantially identical in their

terms and provisions; a copy of one of said contracts, being representative of them all, is hereto attached and marked Exhibit "A."

Under and pursuant to said contracts the Jay Street Terminal acts as the agent of your petitioners in the receipt, handling, and delivery of freight at said terminal and the transportation thereof between said terminal and the rail terminals of your petitioners on the western shore of New York Harbor.

Under and pursuant to said contracts the said Jay Street Terminal lighters or floats eastbound freight from the rails on the western shore of New York Harbor to the docks, wharves, and float bridges at Brooklyn and there unloads it from said lighters or floats and delivers it to the consignees; it receives westbound freight from the shippers and lighters or floats it to the said rails. It assumes full responsibility on all freight while in its possession on behalf
7 of your petitioners and agrees to indemnify your petitioners for all moneys paid out to consignees or to consignors for loss or damage to freight while in its possession. It is agreed that a competent superintendent shall be kept upon the premises, who shall carry out the directions of your petitioners, and said superintendent has authority to issue bills of lading on behalf of each of your several petitioners for westbound freight and to sign the same as agent of your petitioners, which is done, and the said Jay Street Terminal agrees to be responsible for all claims, injuries, or damages arising from their improper issuance. It also agrees to be responsible for and pay to your petitioners all freight charges on eastbound freight and all freight charges payable in advance on westbound freight, and accordingly collects and accounts for the same. It agrees to insure against loss or damage by fire or marine risks all freight, cars, or property while in its possession, received by it under the provisions of said contracts, said insurance to be for the benefit of your petitioners and others as their interests shall appear. It also agrees to enforce the car-service regulations of your petitioners as established from time to time and filed and published in accordance with the act to regulate commerce and the amendments thereof and supplements thereto. It performs the movement in either direction of empty cars between the Jay Street Terminal and your petitioners' terminals on the west shore of New York Harbor; issues waybills and performs other necessary clerical services, and in general furnishes all facilities and performs all work and services required for the receipt or delivery of freight as at any public station of your petitioners, and for the transportation of said freight between the Jay Street Terminal and your petitioners' terminals on the west shore of New York Harbor.

8 In consideration of these services each of your petitioners has agreed to pay its said agent, the Jay Street Terminal, a compensation which is arrived at as follows, to wit:

On freight handled by its said agent originating at or destined to points west of the western termini of your petitioners (that is, west of trunk-line territory, which embraces, in general, all that portion

of the United States lying north of the Potomac and Ohio Rivers and east of Buffalo and Salamanca, New York, and Pittsburg, Pennsylvania), four and one-fifth cents per hundred pounds, and on freight originating at or destined to points east thereof, three cents per hundred pounds, with certain exceptions noted in said Exhibit A.

The Jay Street Terminal serves the shippers of a large and important manufacturing and shipping territory, including about one-third of the densely populated part of Brooklyn. It is the only convenient and accessible freight station of your petitioners for the shippers of that territory. When it became necessary several years ago for your petitioners to establish and operate public freight terminals for the service of the said territory, they had no choice but to enter into a contractual arrangement with the owner of the Jay Street Terminal for the operation of said terminal as a public freight station of your petitioners. The price of the water front property in that section was so high as to be prohibitive. No independent terminals other than the Jay Street Terminal were conveniently accessible to the shippers of that territory. In no other practicable way could your petitioners in the past, nor can they at present, serve the large and important shipping interests of this section of Brooklyn
9 than by the maintenance of the Jay Street Terminal as a public freight station of your petitioners under and pursuant to said contracts.

5. That the said Arbuckle and Jamison operate a sugar refinery in the borough of Brooklyn, located upwards of a block from the Jay Street Terminal. Such shipments are carted from and to the terminal by said Arbuckle and Jamison and handled at the terminal in the same way as the freight of hundreds of other shippers and the freight charges thereon are collected from the said Arbuckle and Jamison by the Jay Street Terminal in accordance with the regularly published tariffs of your petitioners. That approximately four-fifths of the shipments of sugar made by Arbuckle and Jamison through said Jay Street Terminal are sold by said Arbuckle and Jamison f. o. b. Brooklyn, and become the property of the consignee immediately upon delivery to the terminal, which is upon loading into cars at the ter'inal as to all carload shipments. That during the first six months of 1907 the bills of lading issued by the Jay Street Terminal for shipments of general merchandise numbered 92,622, of which 3,969 were for Arbuckle and Jamison sugar and 1,210 for Arbuckle and Jamison coff'e, and the shipments and receipts of said Arbuckle and Jamison constituted less than one-third of the total tonnage moving through the terminal. That during the same period the number of different consignees who received freight at the terminal was about 765 and the number of different shippers through the terminal about 560. That the profits in the operation of the Jay Street Terminal on all shipments during the same period amounted to less than 3% on the investment, without making any allowances for depreciation or interest.

10 6. That the Federal Sugar Refining Company is a corporation of the State of New York, having its executive offices at 138 Front Street, in the city of New York and having its refineries from which it ships all its outbound products, including sugar, and at which it receives all its inbound supplies for the manufacture of sugar and commodities allied thereto, on the east bank of the Hudson River, within the corporate limits of the city of Yonkers, and more than ten miles distant from the northernmost boundary of the lighterage limits of your petitioners, as heretofore set forth and defined. The said refineries are located on the line of the New York Central and Hudson River Railroad Company, with which they have switch connections and over which the Federal Sugar Refining Company ships the greater part of its output and receives a large part of its inbound shipments. Over this railroad, with few exceptions, the rates to points in the shipping territory of the Federal Sugar Refining Company are the same as the rates from the Jay Street Terminal over the lines of your petitioners. That in order to make shipments of its sugar from Yonkers via the lines of you petitioners, at the New York rate, the Federal Sugar Refining Company must deliver such shipments to the New York Central and Hudson River Railroad Company at Yonkers, thence to be transported by that railroad to New York, and there delivered to yours petitioners at points within the lighterage limits. Because of alleged delay in the handling and transportation of such shipments via the route aforesaid, the Federal Sugar Refining Company prefers to deliver said shipments directly to your petitioners by lighter within the lighterage limits. Prior to July, 1909, the Federal Sugar Refining Company of Yonk-
11 ers, the predecessor of the Federal Sugar Refining Company was accustomed to deliver its shipments at Yonkers to the Ben Franklin Transportation Company, which transported the same direct to the terminals of your petitioners on the west shore of New York Harbor at a charge to the Federal Sugar Refining Company of Yonkers of three cents per hundred pounds.

In the month of May, 1907, the Federal Sugar Refining Company of Yonkers filed a complaint with the Interstate Commerce Commission against your petitioners, alleging that the complainant, through the Ben Franklin Transportation Company, performed the same service on its shipments of sugar as were said to be performed by the Brooklyn Eastern District Terminal on shipments of the American Sugar Refining Company and by the Jay Street Terminal on shipments of the Arbuckle Brothers (Arbuckle & Jamison); that the lighterage limits prescribed by your petitioners were unduly discriminatory in that they did not extend to Yonkers and include the refinery of the Federal Sugar Refining Company of Yonkers, and permitted allowances to be made on shipments of sugar from the refineries of Arbuckle Brothers and the American Sugar Refining Company, while not so permitting on the complainant's shipments, because the latter was located outside the prescribed limits. Said practice was said to result in unjust discrimination and undue

prejudice, and to oblige the complainant to pay unreasonable rates. A copy of said complaint is hereto annexed and marked Exhibit "B." A copy of the answer filed by one of your petitioners is hereto annexed and marked Exhibit "C." and is representative of the answers filed by all of your petitioners. Hearings were held thereafter,
12 and on the 24th day of June, 1909, in the aforesaid proceeding
known as docket No. 1082, the said Interstate Commerce Commission made its report and order, a copy of which is hereto annexed and marked Exhibit "D." The said report and order of the Interstate Commerce Commission in docket No. 1082 was to the effect that said complaint should be dismissed because the extension of your petitioners' lighterage limits in New York Harbor was a matter of business discretion and that said Commission had no authority to require such extension beyond the then prescribed boundaries, and that complainant being located outside of the prescribed lighterage limits was not subjected to unlawful discrimination by reason of the practice of your petitioners in affording free lighterage on shipments originating at or destined to points within said lighterage limits, while refusing to so afford on complainants' shipments.

As a device to appear to ship from within the lighterage limits within a month after the issuance of said report and order, a new corporation known as the "Federal Sugar Refining Company," was organized, which established its principal office at 138 Front Street, New York City, and took over the refineries heretofore mentioned in the city of Yonkers, and adopted the following practice: Contracts of sale or orders for sugar were received at 138 Front Street, and each of said orders was given a separate contract number, and said order bearing the contract number was forwarded to the refinery, where the order was filled and the barrels or bags were stamped with the contract number and placed on a lighter. The shipment bearing the contract number remained intact until it reached the hands of the buyer. The refinery received shipping instructions from 138 Front Street, and these shipping instructions showed the
13 contract number, the ultimate destination, and the rail line
over which the shipment was to be transported. The captain of the lighter of the Ben Franklin Transportation Company gave a receipt to the refinery and received from the refinery a so-called bill of lading, which was no more than a form of railroad bill of lading filled in by the Federal Sugar Refining Company and designating a consignment to the Federal Sugar Refining Company, 138 Front Street, New York City, to be transported by the Ben Franklin Transportation Company and showing the contract number with which the shipment had been marked. The said document or alleged bill of lading was not signed by the Ben Franklin Transportation Company through any of its officers or the captain of the lighter or by any other carrier. There was nothing in any of the documents which called for transportation to Pier 24, North River. The said shipping instructions sent from 138 Front Street to Yonkers were to ship to "Federal Sugar Refining Company, 138 Front Street, City. B. F. T.

Co. (B. & O.)" or other initials representing the Ben Franklin Transportation Company and one of your petitioners, as the case may have been. That none of your petitioners could or did perform any transportation service in connection with the Ben Franklin Transportation Company between Yonkers and 138 Front Street, and such shipping instructions were in fact directions to deliver said shipments to the Ben Franklin Transportation Company to be lightered and delivered to one of your respondents at its terminal on the west shore of New York Harbor. The practice has been for the lighter of the Ben Franklin Transportation Company to go to Pier 24, North River, New York, part of which pier is leased to the Ben Franklin Transportation Company, where the captain of the lighter called
14 up the office of the Federal Sugar Refining Company at 138 Front Street and reported the particular shipment then on his lighter. The captain of the lighter was then handed a form of bill of lading not signed by any of your petitioners and showing the name and address of the consignor as the Federal Sugar Refining Company, 138 Front Street, New York, Franklin Street Pier, 24, North River. The lighter then proceeded to the rail terminus of such of your petitioners as had been previously designated in the shipping instructions sent to Yonkers, and there delivered the shipment to such petitioner and obtained the signature of your petitioner's agent at said terminus upon the form of bill of lading theretofore prepared and delivered to said captain as aforesaid, and said bill of lading was stamped by the said petitioner's agent to show the receipt of the shipment at said station on the west shore of New York Harbor.

That such shipments were handled under contract between the Ben Franklin Transportation Company and the Federal Sugar Refining Company for a compensation of three cents per hundred pounds, although the said contract provides for a compensation of four cents per hundred pounds on sugar lightered from Yonkers to Pier 24, North River, payments for said service being made to the Ben Franklin Transportation Company under that provision of said contract which provides for a compensation of three cents per hundred pounds for sugar lightered from Yonkers to your petitioners' rail termini.

8. That having established the practice hereinbefore described, the said Federal Sugar Refining Company filed a complaint in October, 1909, with the Interstate Commerce Commission against your
15 petitioners, a copy of which, together with a copy of the answer of one of your petitioners as representative of the answers filed by all of your petitioners, are hereto annexed and marked Exhibits "E" and "F," respectively. Said complaint alleged in substance that the interstate transportation of the product of the said Federal Sugar Refining Company began at Pier 24, North River, borough of Manhattan, a point within the lighterage limits as aforesaid, and that said Jay Street Terminal is owned and conducted by copartners, named John Arbuckle and William A. Jamison, which said copartners owned, maintained, and operated in connection therewith a sugar refinery at the foot of Jay Street, borough of Brooklyn.

Also that said amounts of three cents per hundred pounds and four and one-fifth cents per hundred pounds were paid to said copartners for the lightering of their sugar from Jay Street, Brooklyn, to the rail termini of your petitioners on the west bank of New York Harbor, and that inasmuch as the said Federal Sugar Refining Company was a competitor of the said Arbuckle and Jamison in the sugar business, it constituted an undue and unreasonable prejudice and disadvantage against said Federal Sugar Refining Company to pay said amounts of three cents and four and one-fifth cents per hundred pounds for the handling of sugar to said Arbuckle and Jamison and not to pay similarly to the said Federal Sugar Refining Company.

9. That hearings were had before the Interstate Commerce Commission upon the last-mentioned complaint on the 25th day of February, 1910, and on the 13th day of April, 1910; and subsequently, to wit, on the 6th day of March, 1911, the Interstate Commerce Commission issued its report and order against your petitioners, being the order first hereinabove referred to, a copy of which
16 report and order is hereto attached and marked "Exhibit
G," requiring your petitioners to cease and desist on or before the fifteenth day of April, 1911, and for a period of not less than two years thereafter to abstain from paying what the said Interstate Commerce Commission has termed allowances to said John Arbuckle and William A. Jamison, copartners trading under the firm name of Arbuckle Brothers, on the sugar of the latter, while at the same time paying no such allowances to said Federal Sugar Refining Company on its sugar, which so-called allowances were found by the Interstate Commerce Commission in its said report to be unduly discriminatory and in violation of the act to regulate commerce.

10. That the Commission erred in finding in said report and order that the practice of stopping the lighter at Pier 24, North River, en route from Yonkers to Jersey City, or other terminal of one of your petitioners, as above described, is different in substance or in legal effect from the practice formerly followed by the Federal Sugar Refining Company of having shipments lightered direct from Yonkers to such terminal, and differentiates the present case from that formerly before the Commission in Docket No. 1082, and in holding that by reason of the stoppage of such lighter at Pier 24, North River, the shipments of the Federal Sugar Refining Company originated within lighterage limits.

11. That the Commission erred in finding in said report and order that your petitioners refused to bear the burden of lightering across the river sugar for the Federal Sugar Refining Company, inasmuch as your petitioners now and at all times referred to in this petition hold themselves out, and have held themselves out, as ready
17 to accept shipments of the Federal Sugar Refining Company at
any point within the lighterage limits and to lighter the same to their respective terminals on the western shore of New York Harbor at their own expense.

12. That the Commission erred in finding in said report and order that Arbuckle Brothers delivered their shipments to your petitioners on the Jersey shore at their own risk, and that at that point and time the liability of your petitioners as common carriers commenced, and that up to that point there is no transportation of the sugar, but only an accessorial service by Arbuckle Brothers in delivering their own shipments to the carrier for transportation. That such sugar of Arbuckle Brothers is in fact covered by the bill of lading of one of your petitioners from the time that it is delivered to the Jay Street Terminal for shipment, and the petitioner whose bill of lading is thus issued is legally liable, if the bill of lading be an order bill of lading to the lawful holder thereof, and if it be a straight bill of lading to the consignee or owner of the shipment, who in either case may be and generally is a party other than Arbuckle Brothers, from the time of such delivery to the Jay Street Terminal. That such lighterage and terminal service performed by the Jay Street Terminal is not an accessorial service, but a service connected with and a part of the transportation and the furnishing of instrumentalities used therein, inasmuch as such service and the furnishing of such instrumentalities is covered by the tariffs of your petitioners on file with the Interstate Commerce Commission, and is a service which your petitioners hold themselves out as common carriers to perform under such tariffs and by their general practice, and which may
18 lawfully be performed by the owner of property with respect to his own property for a just and reasonable compensation paid by the carrier.

13. That the Commission erred in its report and order in holding that your petitioners may not lawfully employ, for public-station facilities, the facilities owned and operated by a shipper and make reasonable compensation therefor to the owner thereof without at the same time permitting other shippers to perform a similar service for the same compensation.

14. That the Commission erred in its report and order in finding that Arbuckle Brothers and the Federal Sugar Refining Company provide similar facilities and perform the same service in the transportation of their property to the terminals of your petitioners on the western shore of the Hudson River.

15. That the Commission erred in its report and order in finding that the contractual arrangement between your petitioners and the Jay Street Terminal saves Arbuckle Brothers the expense of teaming or conveying their traffic to a public terminal.

16. That the Commission erred in finding in its report and order that your petitioners make an allowance to Arbuckle Brothers for the lighterage of their sugar. All payments made by your petitioners to the Jay Street Terminal are made on account of all the services performed and the facilities furnished by the Jay Street Terminal, and the payments of three cents and four and one-fifth cents per hundred pounds, in connection with particular shipments, are not payments

made for lighterage service alone or in respect of any particu-
19 lar shipment, and are not dependent upon the ownership or
the shipper of any particular shipment, but are made as a means and measure of compensation for all the general service performed on behalf of your petitioners by said Jay Street Terminal as a whole.

17. That the Commission erred in its report and order in assuming that your petitioners' offer, to receive shipments of the Federal Sugar Refining Company within lighterage limits, and to lighter the same at their own expense to their terminals on the western shore of New York Harbor, was limited to an offer to receive the same at the Jay Street Terminal. Your petitioners, as above recited, are now and have been ready and willing to receive shipments of the Federal Sugar Refining Company at any point within lighterage limits, whether at a public station or private dock, in accordance with their tariffs on file with the Interstate Commerce Commission.

18. That the Commission erred in its report and order in requiring an allowance to be made to the Federal Sugar Refining Company measured by the amount paid to the Jay Street Terminal for the transportation service performed by it in connection with the sugar of Arbuckle Brothers. Such payments to the Federal Sugar Refining Company, if made at all, must be made for the performance by it of a part of the transportation service from Pier 24 to the terminals of your petitioners on the western shore of New York Harbor, and must be a just and reasonable compensation for such service and not measured by the payment made to the Jay Street Terminal.

That payment to the Federal Sugar Refining Company for lighterage service from Pier 24, North River, to any terminal of your peti-
tioners on the western shore of New York Harbor of the
20 same amount which may reasonably be paid and is paid to the
Jay Street Terminal for the performance of the transportation service furnished by it in connection with the sugar of Arbuckle Brothers, would be an unjust and unreasonable allowance to the Federal Sugar Refining Company, and therefore in violation of the law, inasmuch as the lighterage from Pier 24, North River, to the western shore of New York Harbor costs the Federal Sugar Refining Company nothing, being included without extra charge in the service required by it from Yonkers to the lighterage limits by reason of the fact of the location of its plant at Yonkers.

If, on the other hand, your petitioners should comply with said order of the Commission by not paying any allowance as aforesaid to said Federal Sugar Refining Company and refraining from paying any compensation to the Jay Street Terminal, then your petitioners would be deprived of their property without due process of law, as they would be unable to continue their present lawful contractual relations with said Jay Street Terminal whereby they are afforded a freight station for the general shipping public in the borough of Brooklyn, accessible to said Jay Street Terminal, and would be unable to continue their present lawful practice of permitting the

lighterage of Arbuckle Brothers' sugar from the Jay Street Terminal to your petitioners' terminals on the west shore of New York Harbor, to be performed by the Jay Street Terminal and of paying the Jay Street Terminal a just and reasonable compensation therefor.

19. That the Commission erred in its report and order in finding that your petitioners unduly discriminated against the Federal Sugar Refining Company and unduly preferred Arbuckle
21 Brothers in violation of the act to regulate commerce, because:

(*a*) The circumstances and conditions attending the shipment and transportation of Arbuckle Brothers' sugar from the Jay Street Terminal are substantially dissimilar from the circumstances and conditions attending the shipments of the Federal Sugar Refining Company, as shown by the facts hereinbefore set forth.

(*b*) No preference or advantage accrues to Arbuckle Brothers or prejudice or disadvantage is sustained by the Federal Sugar Refining Company by reason of the lighterage of the sugar of Arbuckle Brothers by the Jay Street Terminal and the payment by your petitioners to said Jay Street Terminal of a just and reasonable amount therefor, and the refusal of your petitioners to make an allowance to the Federal Sugar Refining Company for the lighterage of its sugar to the terminals of your petitioners on the west shore of New York Harbor. The payment to the Jay Street Terminal being no more than just and reasonable compensation for the service performed is only equivalent to the performance of that service by your petitioners, which your petitioners would be required to and would perform with their own equipment if the lighterage of such sugar by the Jay Street Terminal and the payment therefor were discontinued. Your petitioners now, and during all the time referred to in this petition, hold themselves out and have held themselves out as willing to perform the same service from any point within the lighterage limits for the Federal Sugar Refining Company in accordance with their tariffs on file with the Interstate Commerce Commission. What-
22 ever prejudice or disadvantage the Federal Sugar Refining Company may be under arises out of the location of its refineries at Yonkers, beyond the lighterage limits of your petitioners and the necessity it is therefore under of paying for its lighterage.

20. That the Commission erred in its report and order in requiring an allowance to the Federal Sugar Refining Company, in that such order requires in effect the extension of your petitioners' lighterage limits to include the city of Yonkers. That your petitioners have established lighterage limits as above described, within which they perform transportation service as common carriers, and they may not lawfully be required to extend the limits within which they perform such service as an alternative to the discontinuance of lawful contractual relations for the maintenance and operation of terminal station facilities and the performance of transportation service within such limits.

21. That if your petitioners are required to obey said order of the Commission pending final determination of this action, they will suffer and sustain irreparable damage, in that they will be required

either to pay money to the Federal Sugar Refining Company for the lighterage of its sugar from Yonkers to your petitioners' terminals on the west shore of New York Harbor, which money in the event of a final decree herein in their favor they will be unable to recover, or to discontinue payments to the Jay Street Terminal to compensate for the lighterage of the sugar shipments of Arbuckle Brothers, thereby violating the aforesaid contracts with the Jay Street Terminal, and thus subjecting themselves to actions for damages for such violation, and also to the termination of the contracts and loss
23 of the terminal and transportation facilities covered thereby, making it necessary to furnish other facilities to handle the traffic. Moreover, that the discontinuance of the Jay Street Terminal as a public station, which may follow the discontinuance of payments to the Jay Street Terminal for services performed with respect to the sugar of Arbuckle Brothers, would result in great inconvenience and expense to a large number of shippers and receivers of freight who have no access to private wharves or piers and would be required to truck shipments to and from distant public stations.

Wherefore your petitioners pray that a final decree may be entered herein setting aside and annulling said order of the Interstate Commerce Commission, dated the 5th day of December, 1910, and, further, that a temporary injunction may issue herein suspending said order and any and all proceedings thereunder pending a final determination of this proceeding.

And your petitioners will ever pray.

Dated, New York, April 11th, 1911.

Hugh L. Bond,
Jackson E. Reynolds,
W. S. Jenney,
George F. Brownell,
J. F. Schaperkotter,
John B. Kerr,
George Stuart Patterson,
Solicitors for Petitioners.

State of New York,
County of New York, ss:

I, George F. Randolph, having been first duly sworn according to law, do depose and say that I am an officer, to wit, first vice-president of the Baltimore and Ohio Railroad Company, and that I have
24 read the foregoing petition, that I know the contents thereof, and that the statements therein contained are true according to the best of my knowledge and belief.

Geo. F. Randolph.

Sworn to and subscribed before me this 12th day of April, 1911.

[seal.]

C. L. Malcolm,
Notary Public.

Notary public, Kings Co., No. 202. Register's office, Kings Co., No. 4495. Certificate filed in N. Y. Co., No. 3208.

STATE OF NEW YORK,
County of New York, ss:

I, George D. Dixon, having been first duly sworn, do depose and say that I am an officer, to wit, freight traffic manager of the Pennsylvania Railroad Company; that I have read the foregoing petition; that I know the contents thereof, and that the statements therein contained are true according to the best of my knowledge and belief.

GEO. D. DIXON.

Sworn to and subscribed before me this 12th day of April, 1911.

[SEAL.] C. L. MALCOLM,
Notary Public.

Notary public, Kings Co., No. 202. Register's office, Kings Co., No. 4495. Certificate filed in N. Y. Co., No. 3208.

STATE OF NEW YORK.
County of New York, ss:

E. M. Snyder, assistant freight traffic manager of the Central Railroad Company of New Jersey; B. D. Caldwell, vice-president of the Delaware, Lackawanna & Western Railroad Company; D. W. Cooke, general traffic manager of the Erie Railroad Company; T. N.
25 Jarvis, vice-president of the Lehigh Valley Railroad Company; and J. C. Anderson, traffic manager of the New York, Ontario & Western Railway Company, being duly sworn, each for himself deposes and says that he is an officer of one of the petitioners herein, as above stated; that he has read the foregoing petition; that he knows the contents thereof, and that the statements therein contained are true according to the best of his knowledge and belief.

E. M. SNYDER.
B. D. CALDWELL.
D. W. COOKE.
T. N. JARVIS.
J. C. ANDERSON.

Sworn to and subscribed before me this 12th day of April, 1911.

[SEAL.] C. L. MALCOLM,
Notary Public.

Notary public, Kings Co., No. 202. Register's office, Kings Co., No. 4495. Certificate filed in N. Y. Co., No. 3208.

26 EXHIBIT "A."

This agreement, made the fifth day of February, A. D. one thousand nine hundred and six, by and between Jay Street Terminal

(hereinafter called Terminal Company), party of the first part, a
Erie Railroad Company, party of the second part, witnesseth:

Whereas the Terminal Company is the owner of premises
the borough of Brooklyn, city of New York, lying along and co
tiguous to the East River at a point east of Catherine Ferry, so calle
and west of the United States navy yard, upon which there are n
erected, or in process of erection, certain warehouses, bulkheads, doc
and piers, railway tracks, and sidings, equipped or about to
equipped with suitable float bridges and approaches, and the usu
appurtenances for receiving, handling, and delivering freights a
for transporting same between said premises and the freight stati
of said Railroad Company located at Jersey City, N. J.; a

Whereas the said Terminal Company is engaged in and will co
tinue in the business of receiving freights at its said premises a
carrying the same in both directions between its said premises a
the said station of said Railroad Company and other carriers; and

Whereas the said Railroad Company desires to avail itself of t
facilities, conveniences, and services of the said Terminal Compa
in the transportation of freights, in both directions, between the sa
premises of said Terminal Company and the aforesaid freight stati
of the said Railroad Company:

27 Now, therefore, in consideration of the mutual covenan
promises, and agreements herein contained, the said parties
hereby covenant, promise, and agree to and with each other
follows:

First. The said Terminal Company will put and maintain i
premises in good order and condition for the reception and delive
of such freights, and will provide tugboats, car floats, docks, pie
float bridges, and approaches adequate at all times to receive, di
charge, transfer, and deliver such freights loaded or to be loaded
cars under this contract, and sufficient to accommodate the amou
of business hereunder contemplated.

Second. Said Terminal Company will receive at the said flo
bridges of said Railroad Company at its aforesaid freight statio
in cars to be placed upon its floats by said Railroad Company, a
freights intended for delivery at the aforesaid premises of the sa
Terminal Company, and will safely carry the same to its said prem
ises, and there make delivery thereof to the consignees. It will al
receive and load into cars all freights which may be delivered to
at its said premises for transportation over the lines of said Railroa
Company and carry and deliver the same to said Railroad Compan
upon said Terminal Company's floats at the float bridges of sa
Railroad Company at its aforesaid freight station.

Third. The responsibility of said Terminal Company for eas
wardly bound cars and the freights therein shall begin when the ca
are placed upon its floats at the said float bridges at the aforesai
station of said Railroad Company, and shall continue as respects th
cars until they have been returned by it, loaded or empty; an
28 as respects the freights contained in eastwardly bound car
its responsibility shall continue until the actual delivery there

to and acceptance by the consignees at Brooklyn. As respects the freights to be transported westbound, said Terminal Company's responsibility shall commence at the time the same is received from the consignor at its aforesaid premises, and shall continue until said freights, loaded into cars, have been brought to the float bridge of said Railroad Company at its aforesaid freight station and until the floats have been attached to the float bridge, and the cars are in complete readiness for removal from the car floats by said Railroad Company.

Fourth. The Terminal Company agrees to provide and keep at its own expense upon its aforesaid premises a competent person to superintend the business hereunder contemplated, and to carry out the rules of said Railroad Company as to loading cars.

Fifth. The Railroad Company agrees to construct and maintain all necessary tracks, float bridges, approaches, and appurtenances at its said freight station to adequately carry out the purpose of this agreement.

Sixth. Said Railroad Company will pay said Terminal Company in full for all its services under this contract as well as in full compensation for all responsibility to be undertaken by it in respect to cars and freight, as follows:

(*a*) For all freights transported over said Railroad Company's railroad which shall have been received from its connecting lines west of Trunk Line western termini, on through rates, or for freight received by the said Terminal Company at its aforesaid premises and destined for transportation by said Railroad Company to
29 points west of said western termini, on through rates, excepting grain in bulk, at the rate of four and one-fifth ($4\frac{1}{5}$) cents per hundred pounds. It is agreed, however, that whenever the allowance to Palmers Dock on eastbound or westbound rail-and-lake traffic or both is reduced from four and one-fifth ($4\frac{1}{5}$) cents to three (3) cents per hundred pounds, the same reduction shall be made in the allowance to Jay Street Terminal on rail-and-lake traffic. And it is also agreed that whenever the allowance for like service on such traffic to said Palmers Dock or any other Brooklyn terminal is increased above the rates herein specified, the same increase shall be made in the allowance to said Jay Street Terminal on such traffic.

(*b*) For freight originating at or destined to any of the said western termini or points east thereof, or billed to or from said western termini at local rates, the allowance to said Terminal Company shall be three (3) cents per hundred pounds, whether or not the traffic reaches the terminal point through any other of said termini; it being understood that the western terminal points referred to are as follows: Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Salamanca, Erie, Pittsburg, Allegheny, Bellaire, Wheeling, Parkersburg, Dunkirk.

(*c*) For "not to be graded" grain in bulk, for track delivery in the borough of Brooklyn, the rate shall be three cents per hundred pounds.

30 (*d*) For freight which is rated per gross ton, either in official classification or incommodity tariffs, the allowance shall be three cents or four and one-fifth cents per hundred pounds, regardless of the gross ton rating.

Seventh. Said Terminal Company shall not be required to receive or carry any freights which may from time to time be classed as prohibited freights in the joint published tariffs of itself and the Railroad Company.

Eighth. It is understood that no grain shall be delivered by the said Railroad Company subject to this agreement, except "not to be graded" grain billed for track delivery in Brooklyn; and that all such grain shall be delivered by said Terminal Company to the consignees from cars direct to wagons. No grain received by said Terminal Company from said Railroad Company shall be delivered in any other way, and no such grain shall under any circumstances, or at any times, be received or delivered into warehouses or elevators.

Ninth. All coal and coke shall be handled by special agreement.

Tenth. Said charges shall be made for each month and paid on or before the twenty-fifth day of the subsequent month.

Eleventh. Said Railroad Company agrees that during the continuance of this agreement the same rates of freight shall prevail from and to the premises of said Terminal Company that prevail from and to the regular freight stations of said Railroad Company in the borough of Manhattan, city of New York, excepting when coming from or going to points east of Susquehanna, in which case floatage shall be added in both directions, to which the Railroad Company shall be entitled.

31 Twelfth. Said Terminal Company will be responsible for and pay to said Railroad Company all freight moneys and charges as set forth in freight bills rendered by said Railroad Company for the transportation of eastbound freights delivered to it, and in like manner shall be responsible for and pay to said Railroad Company all moneys and charges which have been made payable in advance on westbound freights, all of which payments shall be turned over to said Railroad Company in accordance with the latter's customary rules; and, if so required, the customary guaranteed bond shall be furnished by the said Terminal Company.

Thirteenth. Said Railroad Company will provide sufficient cars at all times for receiving and taking away the freights hereunder contemplated (unavoidable delay excepted), and to supply all the railways books and blanks necessary for the purpose of the business to be carried on under this contract, and with all reasonable despatch to receive and take away from the said float-bridges at its aforesaid station all the westbound freights intended for transportation over its own lines and its connections.

Fourteenth. Said Terminal Company will insure and keep insured against loss by fire and marine risks all freights, cars, and property received by it upon its floats or its said premises under this contract so long as said freights, cars, or property shall remain in its posses-

sion, and until delivered to the consignees or to said Railroad Company as hereinbefore provided, including the time such freights, cars, or property shall be upon its lighterage line; and such insurance shall be for the benefit of said Railroad Company and others as their respective interests shall appear, and to an amount and in such manner as shall be satisfactory to said Railroad Company.

32 Fifteenth. Said Railroad Company will not, during the continuance of this agreement, unless legally compelled to do so, establish or maintain any freight stations within the limits of said borough of Brooklyn between said Catherine Ferry and said United States navy yard. In case of any breach of this condition said Terminal Company may recover from said Railroad Company, and the latter shall pay to said Terminal Company, damages at the rate of three dollars for each and every carload, averaged at twenty thousand pounds, received or delivered or transported contrary to this provision.

Sixteenth. In case any eastbound freight consigned to stations of said Railroad Company in said city of New York other than the premises of said Terminal Company shall have its destination changed to the premises of the said Terminal Company and be delivered thereat, said Terminal Company will, at the request of said Railroad Company, collect from the consignee or forwarder the sum of three (3) cents per hundred pounds, and such three cents per hundred pounds shall be retained by said Terminal Company as full compensation for all services performed by it in such cases, and no other allowance shall be made under this contract in such case.

Seventeenth. Said Terminal Company will furnish said Railroad Company with a complete and accurate copy of each and all contracts made by it with other railroad companies during the term of this contract, and the Erie Railroad Company shall have and enjoy during the life of this contract all rights and privileges granted to any other railroad by said Terminal Company upon as favorable terms, with respect to allowances or otherwise, as granted to
33 any other railroad company, anything herein to the contrary notwithstanding.

Eighteenth. This contract shall become operative and go into effect on the fifteenth day of February, 1906, and shall continue in force until March thirty-first, 1910; thereafter subject to termination upon ninety days' notice by either party.

Nineteenth. In case either party shall wilfully fail to keep or perform any of the terms or provisions herein contained on the part of such party to be kept or performed, then the other party hereto shall have the right to terminate this contract by giving thirty days' notice in writing of such termination to the offending party.

Twentieth. This contract shall be binding upon, for the benefit of and available to the parties themselves and their successors or assigns, as fully and to the same extent as if such successors and assigns had been mentioned in each of the covenants and agreements herein set forth.

In witness whereof the parties hereto have executed this contract in duplicate the day and year first above written.

JAY ST. TERMINAL,
By WM. A. R. SMITH
(A partner).
ERIE RAILROAD COMPANY,
By E. D. UNDERWOOD.

[SEAL.]
Attest:

DAVID BOSMAN, *Secretary*
(Witness as to Jay St. Terminal).

34 EXHIBIT B.

Before the Interstate Commerce Commission.

(Refer to Docket No. 1082 in your Answer.)

FEDERAL SUGAR REFINING COMPANY OF YONKERS
v.
BALTIMORE & OHIO RAILROAD COMPANY; CENTRAL Railroad Company of New Jersey; Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and Pennsylvania Railroad Company.

The petition of the above-named complainant respectfully shows:

I. That complainant is a corporation organized and existing under the laws of the State of New York, having its principal place of business in the city of Yonkers, in the State of New York, and is engaged in refining sugar and in shipping the same between points in different States of the United States.

II. That defendants are common carriers engaged in the transportation of property by railroad between points in different States in the United States, and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

35 III. That complainant owns and operates a sugar refinery located in said city of Yonkers, about 1 mile north of the city of New York, the capacity of said refinery being about 5,000 barrels of sugar per day, approximately 15 per cent of which destined to other States is lightered down the Hudson River to the various terminals of defendants on the New Jersey shore of the Hudson River, except the Baltimore & Ohio Railroad Company, whose terminal is at St. George, Staten Island, and all of which are in the port limits of the port of New York. That the American Sugar Refining Company, through the Brooklyn Eastern District Terminal Company, and the Arbuckle Brothers' Refinery, through the Jay Street Terminal Company, both of said refineries being located in Brooklyn, New York, also float or lighter a considerable portion of their sugar to said

terminals of defendants. That on shipments from Brooklyn aforesaid by complainant's said competitors which are received by defendants at their said terminals an allowance or arbitrary of 4½ cents per 100 pounds is made by said defendants to said Brooklyn refineries, in the manner aforesaid, when the shipments are destined to points west of the western termini of the trunk lines, including Buffalo and Pittsburg, and 3 cents per 100 pounds when shipments are destined to points east of said western termini of the trunk lines. That defendants refuse to make any allowance whatsoever on shipments of sugar delivered by complainant's via the Ben Franklin Transportation Company's lighters to defendants' said terminals. That defendants have arbitrarily fixed a boundary beyond which they will not grant said allowances on shipments received at their terminals by floats or lighters. That said lighterage limits as prescribed by defendants are: On North River—Battery to 135th
36 Street, Jersey side, National Storage Docks, Communipaw to Fort Lee; on East River—New York side, Battery to Jerome Avenue Bridge, Brooklyn side, Pot Cove Astoria, to 69th Street, South Brooklyn. That because complainant's refinery at Yonkers is located outside of said prescribed lighterage limits defendants decline to make complainant the same lighterage allowances which they grant to said Brooklyn refineries, in the manner aforesaid, on shipments delivered at their said terminals. That complainant's refinery is within the port of New York, under and by virtue of an act of Congress approved May 7, 1894, which includes Yonkers within the port of New York, and entitles complainant's refinery located in Yonkers to the same port privileges as are extended to refineries in Brooklyn. That complainant performs identically the same service through the Ben Franklin Transportation Company in the lighterage or floatage of its shipments, so far as the defendants are concerned, as is performed by said Brooklyn refineries, in the manner aforesaid. That complainant's shipments via said terminals when delivered thereat are deliveries to defendants within the lighterage district just as much as the shipments of said Brooklyn refineries are deliveries at said terminals, and there is no reason why complainant should be deprived of said allowances by refusal to grant the same based upon a boundary line prescribed by defendants as establishing free lighterage limits within which defendants themselves render or provide the lighterage service. That said unreasonable restriction results in a great hardship to complainant, undue discrimination in favor of its said competitors in business and should be abolished, substituting therefor a regulation placing complainant upon an equality with its said competitors as to allowances for lighter-
37 age to said terminals. That by reason of such practice defendants charged and collected from complainant between the first day of August, 1902, and the thirtieth day of April, 1907, an excess charge on its shipments of sugar $13,663.76, for which reparation is claimed.

IV. That by reason of the premises defendants have been and are charging complainant unjust and unreasonable rates of transportation over their lines, because of the unjust regulation above set forth, and have been and are subjecting complainant, its said traffic in sugar, and the city of Yonkers, to unjust discrimination and to undue and unreasonable prejudice and disadvantage, and are giving to complainant's said competitors in business at Brooklyn undue preference and advantage, and are not allowing complainant a just and reasonable charge for its service rendered in aid of the transportation of sugar, all of which is in violation of the act to regulate commerce, as amended, and more particularly sections one, two, three, and fifteen thereof.

Wherefore complainant prays that defendants be required to promptly answer the charges herein, that after due hearing and investigation an order be made commanding said defendants to wholly cease and desist from the aforesaid violations of the act to regulate commerce, as amended, and to the full extent thereof; and to pay to complainant by way of reparation said sum of $13,663.76, or such other sum as the Commission may upon the proof to be adduced herein find complainant entitled to recover; that the Commission determine what is a reasonable allowance as to maximum that defendants shall pay to complainant for the service of lightering said shipments of sugar to said terminals; that an order be entered re-
38 quiring said defendants either to withdraw such allowances or free service granted to said Brooklyn refineries, in the manner aforesaid, whereby complainant is compelled to pay unreasonable rates and is unjustly discriminated against, or to make similar allowances to complainant on its shipments delivered at said terminals; that the Commission also prescribe such rules and regulations in lieu of those now existing over defendants' lines as will in the future operate to prevent the continuance of the aforesaid exactions, unjust discrimination, or undue and unreasonable prejudice and disadvantage to complainant and its traffic in sugar, by reason of the unjust regulation or arrangement above set forth, and that such other and further order or orders may be entered as the Commission may deem necessary in the premises and complainant's cause may appear to require.

Dated at Yonkers, N. Y., May 20th, 1907.

FEDERAL SUGAR REFINING COMPANY OF YONKERS,
By EDWIN A. SMITH, *Treasurer*.

EXHIBIT C.

Before the Interstate Commerce Commission.

THE FEDERAL SUGAR REFINING COMPANY OF YONKERS
v.
BALTIMORE & OHIO RAILROAD COMPANY, ET AL.
} Docket No. 1082.

39 The separate answer of the Lehigh Valley Railroad Company, one of the defendants in this proceeding.

The above-named defendant, the Lehigh Valley Railroad Company, for answer to the complaint in this proceeding respectfully states:

1. This defendant has not knowledge sufficient for the formation of a belief as to the organization of the complainant, or the other matters set forth in the first paragraph of the complaint, and prays that the averments of the said first paragraph, so far as material, may be proven.

2. This defendant admits that it is a common carrier by railroad engaged in transportation by railroad, in part interstate, in connection with the railroads of other carriers between various points in the United States, and that so far as relates to its interstate carriage of property, it is subject to the provisions of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and of the acts amendatory thereof and supplementary thereto, so far as the same may be in conformity to the provisions of the Constitution of the United States.

3. This defendant admits that complainant operates a sugar refinery located in the city of Yonkers, New York, but has not information sufficient for the formation of a belief as to the capacity of said refinery, nor as to the portion of its output which is lightered down the Hudson River. This defendant denies that the American Sugar Refining Company and Arbuckle Brothers Refinery lightered or floated in cars sugar to terminals of the defendants. It is informed and believes that sugar is lightered or floated in cars by the Brooklyn Eastern District Terminal Company and the Jay Street Terminal Company, which terminal companies are agents for some or all of the defendants herein. It denies that an allowance of 4½ cents per 100 pounds is made by this defendant to said American Sugar Refining Company and Arbuckle Brothers Refinery when the shipments are destined to points west of Buffalo and Pittsburg, and of 3 cents per 100 pounds when destined to points east of Buffalo and Pittsburg. Such allowance is made to the terminal companies aforesaid, which are agents of this defendant, and the allowance aforesaid is paid to them not only as compensation for the particular service in question, but also in compensation for other services which are performed by the terminal companies. The said terminal companies perform various services under contract with this defendant, and furnish to it a bond for the faithful performance of such services. This defendant admits that it makes no allowance on shipments of sugar delivered by complainants via the lighters of the Ben Franklin Transportation Company, for the reason that that lighterage company is not an agent of this defendant and does not handle its traffic generally; and also because the traffic originates outside of the lighterage limits of New York Harbor; and this defendant makes no such allowances on any such traffic to any transportation or lighterage company on westbound traffic except from within said lighterage limits to its agents as aforesaid. This defendant admits that the lighterage limits of the port of New York are as stated in the com-

plaint; these limits constitute a boundary beyond which allowances are not granted for lighterage. This defendant denies, however, that such fixing of a boundary is arbitrary; it is necessary to the proper and orderly management of its business that there should be fixed lines drawn as to lighterage limits; it submits that the legislation as to the port of New York referred to in the complaint has no connection with the question of lighterage limits. This defendant
41 has not information sufficient for the formation of a belief as to the amount of so-called excess charges that the complainant paid on its shipments of sugar during the five years between 1902 and 1907.

4. This defendant denies that it has been and is charging complainant unjust and unreasonable rates of transportation, and that it is subjecting the complainant and the city of Yonkers to unjust discrimination and undue and unreasonable prejudice and disadvantage, and denies that it is giving the complainant's competitors in business at Brooklyn undue preference and advantage, and denies that it is not allowing complainant a just and reasonable charge in aid of the transportation of sugar. It denies that its action in the premises is in violation of the act to regulate commerce, or of any section thereof.

Wherefore the defendant prays that the complaint in this proceeding be dismissed.

LEHIGH VALLEY RAILROAD COMPANY,
By C. A. BLOOD,
Freight Traffic Manager.

F. H. JANVIER, *Counsel.*

42 EXHIBIT D.

Before the Interstate Commerce Commission.

No. 1082.

FEDERAL SUGAR REFINING COMPANY OF YONKERS
v.
BALTIMORE & OHIO RAILROAD COMPANY ET AL.

(Decided June 24, 1909.)

Report and order of the Commission.

No. 1082.

FEDERAL SUGAR REFINING COMPANY OF YONKERS
v.
BALTIMORE & OHIO RAILROAD COMPANY ET AL.

(Submitted June 23, 1908. Decided June 24, 1909.)

Defendants have prescribed limits in and about New York Harbor within which they will, for the flat New York rate, perform the serv-

ice of transporting traffic between their rail terminals on the Jersey side of the Hudson and points in the harbor. At Yonkers, N. Y., some distance north of the free-lighterage limits, complainant oper-
ates a sugar refinery, and to make shipments therefrom over
43 defendants' lines it must lighter the sugar from its refinery to
points within the lighterage limits or forward it via the New York Central to Sixtieth Street, New York. By the latter route it can obtain the New York rate, but the route is said to be unsatisfactory by reason of delays in the New York Central's city terminals. One of the defendants' leased terminals in Brooklyn is owned and operated by the same partnership which operates a sugar refinery in competition with complainant, the sugar from this refinery passing through the terminal and the partnership receiving from defendants for lighterage thereof the same amount allowed for lighterage of other freight by the same terminal company. It is claimed by complainant that upon shipments delivered by it to defendants' Jersey rail terminals it should receive the same allowance that is made to companies lightering freight from points in New York Harbor, or that the lighterage limits should be extended to include Yonkers. Held:

1. By their lighterage regulations defendants have, in the only available manner, extended their lines to New York, but such extension results from the exercise of business discretion, not from compliance with any requirement of the act to regulate commerce; and by such extension defendants incur no liability, under the act, to extend their lines to Yonkers or other near-by communities.

2. The identity of ownership between the Jay Street Terminal in
Brooklyn and the adjoining refinery in Brooklyn is a relation-
44 ship which should be subjected to the closest scrutiny. The
only inference which can be drawn from the present record is that the Jay Street Terminal does not earn in excess of a reasonable return upon the investment. The 15th section of the act clearly implies that a just and reasonable allowance may be made to the owner of property transported, when such owner renders a service connected with or furnishes an instrumentality used in the transportation, and nothing has been made to appear which indicates that the allowance in question exceeds the authorized measure of compensation. Complaint dismissed without prejudice.

Ernest A. Bigelow and Henry A. Wise for complainant.

Hugh L. Bond, jr., for Baltimore & Ohio Railroad Company.

Robert W. de Forest and Jackson E. Reynolds for Central Railroad Company of New Jersey.

William S. Jenney and Douglas Swift for Delaware, Lackawanna & Western Railroad Company.

George F. Brownell for Erie Railroad Company.

J. F. Schaperkotter and Frank H. Platt for Lehigh Valley Railroad Company.

John B. Kerr for New York, Ontario & Western Railway Company.

George Stuart Patterson for Pennsylvania Railroad Company.

Report of the Commission.

KNAPP, Chairman:

This complaint alleges in substance that defendants' regulations in respect to the lightering of freight in and about New York
45 Ha'bor subject complainant to the payment of unreasonable transportation charges upon shipments of sugar from Yonkers, N. Y., to points upon defendants' lines and unduly discriminate in favor of sugar refineries within the lighterage limits of New York Harbor. Reparation is asked.

Defendants are common carriers subject to the act to regulate commerce. Complainant is a corporation organized under the laws of New York, engaged at Yonkers, N. Y., in refining sugar. Its refinery is situated upon the east bank of the Hudson River and includes about 500 feet of water front, where it has docks, bulkheads, and other facilities for handling and shipping its product by vessel. Complainant began to refine sugar in 1902 and its maximum capacity is now about 5,000 barrels per day. Its actual daily output has apparently averaged between 3,000 and 4,000 barrels, or 30 to 40 carloads.

There are three principal routes by which complainant can ship its product from Yonkers. It has sidetrack connection with the New York Central Railroad and ships the greater part of its product to points conveniently accessible via that line and its connections. To southern and southwestern points it can ship via the coastwise steamship lines and their southern rail connections. When shipping over these water and rail routes complainant lighters its own shipments from Yonkers to the New York piers of the coastwise lines, and is given for such service an allowance out of the through rate which varies according to the destination of the shipment, but appears on the whole to cover the expense of lighterage and in some instances to leave a profit to complainant. To points on defendants' lines which can not be conveniently reached by routing north over
46 the New York Central defendant can ship south over that line. In such case shipments are carried by the New York Central to Sixtieth Street, thence floated across New York Harbor and delivered to defendants at their depots on the west side of the river. The rates from Yonkers to points on defendants' lines via this route are in most instances the same as the rates from New York to the same destinations. But complainant alleges that the delay involved in handling shipments via this route is so great as to make its use commercially impracticable. It is said that, owing to the congestion of traffic in the yards of the New York Central in New York, ten days on the average are consumed in transporting a car from Yonkers to defendants' terminals. It is also asserted that the New York Central does not and can not furnish sufficient cars to care for complainant's shipments. For this reason, it is alleged, complainant hires the Ben Franklin Transportation Company to lighter from its refinery at Yonkers to defendants' freight depots on the Jersey shore shipments requiring transportation over their lines, and pays for this

service 3 cents per 100 pounds. And this situation, in connection with defendants' lighterage regulations in respect of traffic passing across New York Harbor, gives rise to this complaint.

Defendants have established so-called lighterage limits in and about New York Harbor—that is to say, they have prescribed limits within which they will, at the flat New York rate, receive and deliver traffic at points in New York Harbor. The free lighterage limits are defined in the tariffs of all the defendants as follows:

NORTH RIVER.

New York side: Battery to One hundred and thirty-fifth Street.

New Jersey side: National Storage docks, Communipaw, to and including Fort Lee, N. J.

47 EAST RIVER AND HARLEM RIVER.

New York side: Battery to Jerome Avenue Bridge, including Harlem River side of Wards and Randalls Islands.

Brooklyn side: From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal west of Washington Avenue Bridge and to Hamilton Avenue Bridge, Gowanus Canal, and to and including Sixty-ninth Street, South Brooklyn (Bay Ridge).

NEW YORK BAY.

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill van Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, Staten Island.

The practical effect of the lighterage service established by defendants is to extend their lines to New York and Brooklyn instead of stopping at the western side of the Hudson. In some instances the piers to and from which freight is lightered are the property of individual lines; others are used as union terminals by all the defendants. In case of certain bulky articles requiring special equipment defendants do not perform the lighterage service themselves, but make an allowance to outside lighters which perform that service for them.

The Jay Street Terminal and the Brooklyn Eastern District Terminal, in Brooklyn, are in the nature of union terminals and are designated as regular terminals of defendants in all their lighterage tariffs except those of the Pennsylvania Railroad Company, which has its own freight station adjoining the Brooklyn Eastern District
48 Terminal and handles freight through that terminal only to a limited extent. The two terminals mentioned are owned by independent concerns with which defendants have contracts, substan-

tially alike, which in fact make them the terminals of defendants for all purposes of receiving and delivering general freight from and to large shipping districts in Brooklyn. Defendants pay these terminals for their service $4\frac{1}{3}$ cents per 100 pounds on all shipments handled through the terminals originating at or destined to points west of defendants' western termini, and 3 cents per 100 pounds upon shipments originating at or destined to said western termini or points east thereof. The two terminal companies, under these contracts, lighter or float eastbound freight from defendants' rail terminals to their respective terminals in Brooklyn and deliver it to consignees. They receive west-bound freight from shippers and lighter or float it to the west bank of the Hudson. They assume full responsibility for all east-bound freight upon receiving it from the railroads and for all west-bound freight until delivered to the railroads, and agree to indemnify the roads for all money paid out by them for loss of or damage to such freight while in the possession of the terminal companies. The terminal companies have authority to issue bills of lading of the railroads for west-bound freight and are responsible for all claims, injury, or damages arising from their improper issuance. They are responsible for and pay to the railroads all freight charges on east-bound freight handled through their terminals and all freight charges payable in advance on west-bound freight. The situation to-day is practically the same as it was, and had been for years, when complainant began operations at Yonkers.

49 The Brooklyn Eastern District Terminal extends from North Fifth Street to North Tenth Street, in Brooklyn, covering 8 or 10 squares. It is owned by the partnership of Havemeyer & Elder. About half a mile from this terminal is the refinery of the American Sugar Refining Company, whose shipments over defendants' lines are handled through that terminal. The American Sugar Refining Company is a corporation and has no interest in the terminal. Members of the partnership of Havemeyer & Elder own 136 shares of the common and 81 shares of the preferred stock of the sugar company, whose total capital stock exceeds $50,000,000. Prior to 1890 Havemeyer & Elder owned the refinery adjoining the terminal which is now the property of the American Sugar Refining Company.

The Jay Street Terminal in Brooklyn is located at the foot of Bridge Street, has a water frontage of 1,200 feet, and is about 600 feet deep. It is owned by a partnership composed of William A. Jamison and John Arbuckle. The Arbuckle Brothers Sugar Refinery, adjoining the Jay Street Terminal, is also owned by the same partnership. The total investment in the terminal property was shown to amount to approximately $1,200,000. It was testified that the net earnings from the operation of the terminal for 1907 was $35,566.84, or about 3 per cent on the investment, without making any allowance for interest or depreciation, and there is nothing in the record to indicate that the fact is otherwise.

Complainant's refinery at Yonkers is about 10 miles north of the present lighterage limits on the New York side of the Hudson.

From the refinery to the rail terminals of defendants the distances are as follows: To the D. L. & W. Terminal, about $13\frac{1}{2}$ miles; to the Erie Terminal, about $13\frac{3}{4}$ miles; to the Pennsylvania Ter-
50 minal, about 14 miles; to the Central Railroad of New Jersey Terminal, about 16 miles; and to the B. & O. Terminal at St. George, Staten Island, about 20 miles. It appears that these distances are but a trifle more than the distances from Jerome Avenue Bridge, one of the extreme points in the free lighterage district on the East River, to the same terminals; but the distances to these Jersey terminals, respectively, from the Jay Street and Brooklyn eastern district terminals are quite small in comparison with the distances from Yonkers.

It will thus be seen that upon shipments to points on defendants' lines lightered from Yonkers complainant is at a disadvantage of 3 cents per 100 pounds, the cost of such lighterage, in comparison with the sugar refineries within the New York lighterage limits. Complainant asserts that this disadvantage results from unlawful discrimination by defendants in refusing to send their lighters to Yonkers to collect its shipments, or to make complainant an allowance out of the rate equal to the cost of lighterage; and upon the validity of this contention the case must be determined.

It is apparent that if there is any such wrongdoing as complainant alleges it must be caused in one or both of two ways: (1) Either complainant, in common with the city of Yonkers, suffers injury because defendants' refusal to perform lighterage service between Yonkers and Jersey City is an unjust discrimination; or (2) complainant individually is injured because of unlawful advantages accruing to the American Sugar Refining Company and the Arbuckle Brothers Sugar Refinery by reason of the relations existing between those refineries and the defendants through their contracts with the Brooklyn eastern district and Jay Street Terminals.

51 Upon all the facts disclosed in this proceeding we are constrained to hold that failure to furnish lighterage service to and from Yonkers, while according such service to and from Greater New York, does not constitute unlawful discrimination. In fact, it is doubtful whether it comes within the legal meaning of discrimination, unjust or otherwise, unless it follows that the extension by a carrier of its line to a certain community results in unjust discrimination against another community which its line does not reach. It is clear to us that the so-called terminals in New York and Brooklyn, whether owned, leased, or operated under contract, are in fact the terminals of the defendant roads. The defendants by their tariffs agree to receive and deliver freight at those terminals; are responsible to the shipper or consignee for damage to or loss of property up to the time it is delivered at and after it is accepted at those terminals; and by their tariffs and bills of lading agree to carry not merely to their Jersey City terminals but across the river to the several terminals in New York and Brooklyn.

The necessity of lighterage grew out of the peculiar situation of New York. Defendants could not practically reach that city either by tunneling under or bridging over the river; but the amount of traffic in that community made it highly desirable that they should in some convenient form be able to receive and deliver freight in the city, and therefore they adopted the only available means to that end—the extension of their lines by ferries and lighters. But this extension of their lines to New York was not in compliance with any requirement of the act to regulate commerce. It was merely the exercise by the carriers of business discretion in a matter of physical operation concerning which the Federal Government has not assumed to exercise authority, if any exists. As was said in
52 Shamberg v. D., L. & W. R. R. Co., 4 I. C. C. Rep., 630, 662, referring to the lighterage service of defendants in New York Harbor:

"The geographical and physical conditions of the port of New York are such that lighterage or transfer of cars by floats is indispensable. All roads are obliged to do it, more or less, and it is done for all kinds of traffic and for shippers generally. It is simply a necessity of the situation, and doubtless an inconvenience and expense that all would be glad to avoid if possible."

It must not be inferred that the Commission disclaims jurisdiction over defendant's lighterage service. On the contrary, that service must, in our opinion, be conducted in accordance with the requirements and prohibitions of the act. All we hold is that by establishing a lighterage service in New York Harbor defendants incurred no liability, under the act to regulate commerce, to extend that service to Yonkers or other near-by communities, for the obvious reason that defendants have made themselves carriers by their own lines to New York, but have not assumed, and can not be required by this Commission to assume, any such obligation in respect of Yonkers.

The whole argument of complainant on this branch of the case rests upon the proposition that defendants' terminals are on the Jersey side of the Hudson and that the lighterage service by which they reach Greater New York is an accessorial service, so to speak, like cartage, for example, which they can not grant to the sugar refineries in Brooklyn and lawfully withhold from complainant. We are unable to agree with this contention. In our judgment the Brooklyn terminals in question, like others within the lighterage limits of New York Harbor, are the railroad terminals of defendants in
53 that city, none the less so because they are reached by ferries instead of bridges. For these are the places to and from which Brooklyn traffic is taken in the cars in which it is transported, the places where that traffic is received from and delivered to the public, where it is loaded into and unloaded from defendant's cars substantially the same as if those cars were not floated across a river. To and from these places, and serving the public in that capacity, the defendants are common carriers "wholly by railroad" within the meaning of that phrase in the first section of the act. They have not under-

taken to provide railroad facilities at Yonkers, a distinct municipality, and their refusal to furnish or engage in transportation to and from that city on the same terms and conditions as apply at Brooklyn is not a violation of the regulating statute.

Even if this lighterage service be regarded as a species of cartage, it would not necessarily follow that it must be extended to Yonkers, because it is provided in Greater New York. That is to say, the peculiarities of New York's situation might justify defendants in affording to shippers in that city a facility of this kind which they would not be bound to furnish elsewhere. But any discussion of the point is unnecessary in view of the conclusion already stated. Holding, as we do, that failure to establish lighterage service to and from Yonkers is not unjust discrimination, we must deny the application for a corrective order predicated upon such alleged discrimination.

Defendants do join with the New York Central in through routes and joint rates from Yonkers to points on their lines, and in general Yonkers takes New York rates and therefore, so far as rates are concerned, is on a parity with New York. If these through routes
54 are unsatisfactory, the apparent remedy is an application to
the Commission to establish a satisfactory through route, provided there are carriers whose duty it is to join in forming such a route.

The relationship existing between the American Sugar Refining Company and the Brooklyn Eastern District Terminal, by means of stock ownership in the former by members of the firm who own the latter, is apparently so slight as to require no comment, and that question was virtually waived on the hearing. The relationship existing between the Jay Street Terminal and the Arbuckle Brothers Sugar Refinery presents one of those embarrassing situations which inevitably arises when a portion of the service which the carrier is required or undertakes to perform is farmed out to a party who supplies a large percentage of the traffic in respect of which such service is rendered. Such an arrangement naturally excites suspicion and should be subjected to the closest scrutiny. In the present case, as above stated, the partnership of Jamieson & Arbuckle own both the Jay Street Terminal and the Arbuckle Brothers Sugar Refinery; and approximately one-third of the traffic passing through that terminal is shipped from or consigned to the sugar refinery. It appears that it is difficult, if not impossible, for defendants to obtain in this section of Brooklyn water front upon which to erect a terminal of their own. Moreover, the Commission has already held that railroads may secure and maintain freight depots by contract with independent concerns, and that such depots thereby become legally and to all intents and purposes the freight depots of the railroads. Cattle Raisers' Asso. v. C., B. & Q. R. R. Co., 11 I. C. C. Rep., 277; R. R. Com. of Ky. v. L. & N. R. R. Co., 10 I. C. C. Rep., 173; Central Stock Yards Co. v. L. & N. R. R. Co., 192 U. S., 568. If, then, the
55 defendants may lawfully contract for the use of the Jay
Street Terminal, the only question remaining is whether the

amount paid to this terminal operates in effect as a rebate upon the Arbuckle sugar shipments. The principle involved has been stated In the Matter of Allowances, 12 I. C. C. Rep., 85, as follows:

"It is true that under the terms of section 15 of the amended act to regulate commerce a shipper may receive, in the rates charged, a 'just and reasonable' allowance from a carrier for any service or instrumentality furnished by him in connection with the transportation of his own property. This provision, however, must be read in connection with the other provisions of the law forbidding and making unlawful any arrangement or practice that results in an undue preference or an unjust discrimination in favor of one shipper as against others, or that results in a rebate or other departure from the lawfully published rates. And therefore if the allowance involves a profit over and above the actual cost of the service rendered it becomes, when made to a shipper, a rebate and an unlawful discrimination to the extent of the profit realized. It is not a rebate when it does not exceed the actual cost. But to avoid that fundamental objection the actual cost of the service rendered must be the limit of the allowance."

Upon the present record it is not shown that any profit accrues to the Jay Street Terminal under the payments now made, as stated above, of 3 and 4 1/5 cents per 100 pounds. Indeed, the only inference which can be drawn from the proof submitted is that the Jay Street Terminal does not receive a reasonable return upon the investment. If this be the truth of the matter, as must be assumed on the evidence now before us, we are unable to perceive that the existing relationship between the defendants and this terminal company
56 is illegal or results in any violation of the act. The fifteenth section as amended clearly implies that a just and reasonable allowance may be made to the owner of property transported, when such owner renders a service connected with or furnishes an instrumentality used in the transportation. This provision, for aught we can see, applies to the Arbuckle concern, and nothing has been made to appear which indicates that the allowance to that concern exceeds the authorized measure of compensation.

Moreover, it is evident that the disadvantage of complainant does not arise from the fact that Arbuckle Brothers own and operate the Jay Street Terminal, but rather and simply from the fact that they are within while complainant is outside of the free-lighterage district. If Arbuckle Brothers should transfer that terminal to the defendants, or to an outside party, and cease to have any interest in it whatever, complainant would derive no appreciable benefit. As against complainant Arbuckle Brothers would have the same advantage as at present, under their contract with defendants, if they were to sell their Brooklyn plant to an independent refiner and establish their own business of refining sugar in Jersey City or Philadelphia. The contract in question is of no practical consequence to complainant, and its situation would not be improved in any substantial or noticeable degree if that contract were canceled and the Jay Street Terminal

operated by defendants. So far as concerns complainant there is no practical difference in the relations of defendants with Arbuckle Brothers as shippers of sugar and the American Sugar Refining Company as a shipper of the same commodity, although in one case the common ownership of refinery and terminal is complete, while in the other case such common ownership is a negligible quantity.

57 This, of course, is upon the assumption that we are correctly informed by the evidence as to the financial results of the operation of the Jay Street Terminal under the Arbuckle contract. If the facts are otherwise, as complainant has had full opportunity to ascertain and as might be found upon more complete and accurate disclosure, we would presumably be led to a different conclusion.

Upon the showing now made we are constrained to hold that such discrimination as at present exists in favor of the Arbuckle refinery by reason of the relationship in question is not undue or unlawful. This determination, however, will not preclude the further investigation of this phase of the controversy, either at the instance of this complainant or in an independent proceeding. It follows that the complaint should be dismissed without prejudice, and it will be so ordered.

Clark, Commissioner, concurring:

I agree fully with the views of the majority on the question of extending defendant's lighterage limits so as to include Yonkers. I agree also with the conclusion of the majority report to the effect that defendants should not be required to pay complainant for lightering its sugar to defendants' terminals in the lighterage limits. I base that view, however, upon the fact that complainant's factory is outside the lighterage limits, and that, therefore, no obligation rests upon the defendants to either go and get complainant's shipments or hire another to perform that service. In my opinion, if the complainant were located within the lighterage limits the defendants could not lawfully permit complainant's competitors to lighter their sugar and receive pay for that service and refuse to permit complainant to lighter its sugar and receive the same compensation for that service.

58 It is not enough to say that because the Jay Street Terminal as a whole, yields small dividends, Arbuckle, as the owner of the Jay Street Terminal, receives no profit from the lightering of Arbuckle's sugar. The whole plant might be run at a loss and still there might be an abnormal profit in the lightering of sugar. It is all a question of fact and of bookkeeping.

I think, therefore, unjust discrimination would necessarily exist if defendants permitted one sugar shipper within the lighterage limits to lighter his sugar and receive pay for that service and refused the same privilege and compensation to another sugar shipper also located within the lighterage limits. It might be that one such shipper would make a profit out of such allowance and that another shipper would not, just as one may make more profit than the other

from the manufacture of the sugar. That, however, is a question of business ability, management, or advantage which neither the carriers nor this Commission has any right to undertake to adjust or equalize.

LANE, Commissioner, dissenting:

I can not agree with the order of dismissal which the majority directs to be entered in this case. The principle involved is so important, and I am so certain that such arrangements as the one here under examination are discriminatory and bound finally to be forbidden if fully discussed, that I venture to set out at some length certain grounds of dissent.

The railroads ending at the Jersey shore are under necessity to provide themselves with terminal facilities in New York City and Brooklyn. Not only it is to their advantage to do so, but it is to the public interest also. The shippers of New York City and
59 Brooklyn would, in many cases, be compelled to remove their places of business to other points if the transportation facilities afforded them by the lighterage extensions of the rail lines were withdrawn. Apparent as it is, however, that lighterage facilities as extensions of the New Jersey rail ends to Brooklyn are necessary and commercially inevitable, it can not be forgotten that the chief purpose of the act to regulate commerce is the prevention of discrimination, and that no arrangements whatever to secure such extensions can be lawfully allowed to work discrimination between shippers.

In this particular matter of the transportation of sugar from Brooklyn to the West, the fact appears that the railway carriers have chosen, as the concerns to furnish the lighterage facilities from Brooklyn to the Jersey shore, concerns which are either directly engaged in the refining and shipping of sugar or which are so closely identified with the business of refining and shipping sugar that the routing of an immense tonnage is subject to their disposition. Having so chosen such persons to furnish lighterage facilities the railways should be required to do whatever may be necessary to remove any resulting discrimination against other shippers of sugar.

By the arrangements here under consideration the firm of Arbuckle Brothers, a shipper of sugar from Brooklyn, upon delivery of freight from its boats to the rail ends on the Jersey shore receives an allowance of 60 cents per ton upon shipments to Pittsburg or east thereof, and an allowance of 85 cents per ton on shipments to points west of Pittsburg.

The American Sugar Refinery has a more complex form of organization, its power as a shipper being used to further the fortunes of an independent corporation owning the floats and lighters
60 on which its sugar reaches the Jersey shore. The Commission does not know what the ownership relation is between the American Sugar Refinery and the Brooklyn Eastern District Terminal, the lighterage concern patronized by it. It does know that the

refinery has in the past and does now use its power as a shipper to add to the earnings of the terminal company.

The first lighterage contract involving the use of the property now known as the Brookyn Eastern District Terminal was made on September 1, 1881. The parties to the contract were Lowell M. Palmer, personal representative of H. O. Havemeyer, and the New York, Lake Erie & Western Railroad Company. Mr. Palmer was traffic manager of the Havemeyer & Elder Sugar Refinery, now incorporated in the American Sugar Refining Company. He was also the manager of the docks known as Palmer's docks, now used as the Brooklyn Eastern District Terminal and enjoying one of these lighterage arrangements. Mr. Havemeyer was the owner of the Havemeyer & Elder Sugar Refinery and also of these docks. The contract by which Palmer became the lighterman of the New York, Lake Erie & Western Railroad Company contained as one of its stipulations:

"The party of the first part (Lowell M. Palmer) agrees that during the continuation of this contract he will give to the second party the exclusive transportation on its line of railroad and connections, all the east and west bound freights destined to points upon the railroad of the second party, or which can be reached by the railroad of the second party and its connections which he can influence or control."

The compensation under this contract was the sum of 4 1/5
61 cents for each 100 pounds of freight transferred in either
direction by the lighterman.

It needs but slight experience with the rebating contracts into which the carriers were forced by large shippers prior to effective supervision under the act to regulate commerce to enable one to recognize the above as a sale of tonnage by which one shipper of sugar was placed at an advantage over all other shippers not enjoying like or equal privileges.

The Commission also knows that the relationship between the American Sugar Refining Company and the Brooklyn Eastern District Terminal is still potent to add to the earnings of the latter.

In the investigation of this Commission in the matter of allowances for transfer of sugar, it was testified by the freight traffic manager of the Pennsylvania Railroad that it made the allowance to the Brooklyn Eastern District Terminal because the people who controlled that terminal also controlled the routing of the sugar of the American Sugar Refining Company. I quote from the record in that case:

"Q. You have a terminal of your own near-by the Brooklyn Eastern Terminal, I believe?

"A. Yes, sir.

"Q. Then why do you handle sugar from the Eastern District Terminal?

"A. That is rather a difficult question to answer.

"Q. Is it in order to handle sugar?

"A. Yes, sir.

"Q. In order to get the sugar to handle?

"A. Yes, sir.

"Q. And if you did not handle through the Brooklyn Eastern District Terminal, it is your theory that you would not get it to handle?

"A. No; I do not think we would.

62 "Q. That is because the Brooklyn Eastern District Terminal people, the people who control that terminal, also control the routing of the sugar, is it not?

"A. Yes, sir.

"Q. And you have the routing through their terminal and make the lighterage payments to them in order to get the tonnage?

"A. That is my understanding."

So far as Arbuckle Brothers are concerned no question can exist of the relationship of the lightermen and the sugar shipper for the reason that one partnership alone is involved, and this case might well turn upon the discrimination enjoyed by that firm. The Commission has good reason to believe that the arrangement by which, when they began competition with the Havemeyer interests in the year 1898, Arbuckle Brothers became lightermen for the various railroads, was entered into by the railroads in response to the demand of the new sugar refiners and shippers that they should enjoy equally as favorable relations with the railroads as were enjoyed by their long-established competitors. The arrangement with Arbuckle Brothers, therefore, may be said to have been entered into in order to prevent a discrimination between them and the American Sugar Refinery Company. It follows, however, that these arrangements give them the same advantage over sugar shippers not enjoying such arrangements as were previously possessed by the Havemeyer interests.

It is asserted in the majority report that "section 15 of the act clearly implies that a just and reasonable allowance may be made to the owner of property transported when such owner renders a service connected with or furnishes an instrumentality used in the transportation." So far from fortifying the view of the majority, the
63 reference to that provision in the act rather emphasizes the wrong to the complainant in the present situation. For if the carriers make an arrangement with Arbuckle Brothers that permits them to render a service and furnish an instrumentality by which their sugar is delivered to the defendants at the Jersey City terminals and make an allowance to them therefor, under every principle of equality embodied in the act the defendants must offer the same privilege to the complainant; and if the complainant renders a like service and furnishes a like instrumentality in getting its sugar to the defendants at Jersey City, it is clear that it is entitled to a like allowance. The complainant owns an extensive dock at Yonkers adjoining its refinery, and it hires lighters to move its sugar to Jersey City. It renders precisely the same service and uses precisely

the same instrumentalities in connection with its sugar that Arbuckle Brothers use in delivering their sugar at the Jersey City terminals of these defendant carriers. And it needs no argument to demonstrate that when one shipper, upon the delivery of his sugar to the defendants at Jersey City, receives a substantial allowance, while another shipper, upon delivering his sugar at Jersey City, receives no allowance, the result is an unjust preference of the one and an undue discrimination against the other.

In a word, as between two shippers competing in the same line of business, a carrier may not lawfully discriminate under a contract of this nature even when entered into in good faith in order to supply itself with needed facilities. If such an allowance is made to one shipper for the service rendered and instrumentalities furnished by him in getting his sugar into the hands of the defendants at Jersey City, it is unlawful to withhold a similar allowance from the
64 complainant for doing precisely the same thing with its sugar.

The fact that its refinery is outside the lighterage limits is of no significance. The burden of its additional distance is its misfortune. But it is entitled to deliver its sugar into the possession of the defendants at Jersey City upon exactly equal terms with Arbuckle Brothers. If the trunk lines do not see fit to extend their services to Brooklyn with their own equipment, but choose to farm out that service to the concerns controlling the immense sugar tonnage to the westward (which, it has been testified by Vice-President Caldwell, of the Delaware, Lackawanna & Western Railroad, is 30 per cent of the total tonnage westbound out of Greater New York), then they should be compelled to so adjust the arrangement that no discrimination will be caused by it.

What is here said must not be construed as an indorsement of the system of rate making by allowances instead of by net rates. It is a condemnation of the still more pernicious system of discriminative rate making by means of allowances so contrived as to be open to only a portion of the shippers.

I am authorized to say that Commissioners Clements and Harlan join in the views herein expressed.

65 *Order.*

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 24th day of June, A. D. 1909.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

Federal Sugar Refining Company of Yonkers
v.
Baltimore & Ohio Railroad Company et al. } No. 1082.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full inves-

tigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed without prejudice.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached, and entitled "Report and order of the Commission," are true copies of the originals now on file in the office of this Commission.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the Commission this 13th day of July, 1909.

[SEAL.] E. A. MOSELEY, *Secretary.*

66 EXHIBIT E.

Before the Interstate Commerce Commission.

FEDERAL SUGAR REFINING COMPANY, complainant,
vs.
BALTIMORE & OHIO RAILROAD COMPANY; CENTRAL Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railroad Company; and The Pennsylvania Railroad Company, defendants.

Docket No. 2888.

The petition of the above-named complainant respectfully alleges and shows:

I. That complainant is a corporation organized and existing under the laws of the State of New York; that it has offices at 138 Front Street, in the borough of Manhattan, city of New York; and that it is engaged in refining sugar and shipping the same between points in different States in the United States.

67 II. That defendants are common carriers engaged in the transportation of property by railroad between points in different States in the United States, and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4th, 1887, and acts amendatory thereof and supplementary thereto.

III. That the rail terminals of the defendants are located on the New Jersey shore of the Hudson River, except that of the defendant the Baltimore & Ohio Railroad Company, which is located at St. George, Staten Island.

IV. That the complainant is located within the free lighterage limits established by the defendants, having its office at 138 Front Street, Borough of Manhattan, City of New York; that it bills its through shipments from said office; that the interstate transportation of its product under such through billing begins at Pier 24, North

River, Borough of Manhattan, whence it is lightered by the complainant and delivered to the defendants at their rail terminals aforesaid for transportation under said through billing at the New York rate.

V. That John Arbuckle and William A. Jamison are co-partners engaged in the business of manufacturing and dealing in sugar under the firm name of "Arbuckle Brothers," and having a principal place of business at No. 71 Water Street, Borough of Manhattan, City of New York.

VI. That the said John Arbuckle and William A. Jamison, as co-partners, conduct a terminal and lighterage business under the name of "Jay Street Terminal," owning, maintaining, and operating in connection therewith an extensive water front and docks adjacent to their refinery at the foot of Jay Street, Borough of Brooklyn, together with tug boats, car floats, and the usual appurtenances for receiving, handling, and transporting freight by water.

68 VII. That the product of the sugar refinery operated by the said John Arbuckle and William A. Jamison under the name of "Arbuckle Brothers" is lightered or floated in their own equipment from their dock at the foot of Jay Street, aforesaid, by the said Arbuckle and Jamison, operating under the name of "Jay Street Terminal," and delivered to the defendants at their rail terminals aforesaid for transportation at the New York rate.

VIII. That the respective initial points of the said lighterage service—that is to say, Pier 24, North River, and Jay Street—are within the free lighterage limits aforesaid.

IX. That the complainant and the said Arbuckle and Jamison lighter their product from said initial points to the aforesaid rail terminals of the defendants at their own expense and risk.

X. That the complainant and the said Arbuckle and Jamison perform substantially the same service in the lighterage of their respective products from the said initial points to the rail terminals of the defendants.

XI. That for lightering their product from Jay Street to the rail terminals of defendants as aforesaid the said Arbuckle and Jamison are paid by the defendants at the rate of 4½ cents per 100 pounds on shipments destined to points west of the western termini of the trunk lines, including Buffalo and Pittsburg, and 3 cents per 100 pounds on shipments destined to points east of said western termini.

XII. That the defendants refuse to make any compensation to the complainant for lightering its product from Pier 24, North River, to the rail terminals of the defendants.

69 XIII. That the said Arbuckle and Jamison are competitors of the complainant in the sugar business and market their product in competition with and in the territory served by the complainant.

XIV. That, by reason of the premises, the defendants have been and are charging complainant unjust and unreasonable rates for transportation over their lines from their said rail terminals; and have been and are charging, collecting, and receiving from the complainant a greater compensation for transporting its sugar than they have

been and are charging, collecting, and receiving from the said John Arbuckle and William A. Jamison for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions; and have been and are subjecting complainant and its traffic in sugar to an undue and unreasonable prejudice and disadvantage in favor of the said Arbuckle and Jamison; all of which is in violation of the act to regulate commerce, as amended, and more particularly sections one, two, and three thereof.

XV. That the facts above set forth have existed since the 20th day of July, 1909, wherefore the complainant has been compelled to pay to the defendants, from the said date to the 1st day of September, 1909, an excess charge on its shipments of sugar amounting to two thousand two hundred and forty-three dollars ($2,243), as more fully appears in Schedule A, hereunto annexed, and which is to be taken as a part of this petition.

Wherefore complainant prays that defendants be required promptly to answer the charges herein; that after due hearing an order
70 be made commanding said defendants wholly to cease and desist from the aforesaid violations of the act to regulate commerce, as amended, and to pay to complainant, by way of reparation, said sum of two thousand two hundred and forty-three dollars (2,243), or such other sum as the Commission may, upon the proof to be adduced herein, find complainant entitled to recover; and, further, that an order be entered requiring defendants to grant to the complainant the same privilege of lightering its product from a point within free lighterage limits to the rail terminals of the defendants, and the same compensation therefor, as have been heretofore and are now granted and allowed to the said John Arbuckle and William A. Jamison in regard to their shipments of sugar lightered by them from Jay Street to the rail terminals aforesaid; and that such other and further orders may be entered as the Commission may deem necessary in the premises and the complainant's cause may require.

Dated at 138 Front Street, borough of Manhattan, City of New York, September 29, 1909.

Federal Sugar Refining Company,
By C. A. Spreckels, *President*.

Ernest A. Bigelow,
Attorney for Complainant,
15 William Street, New York City.

71 Schedule A.

Being a statement of excess charges demanded, collected, and received from the complainant during the period from July 20th to September 1st, 1909, as follows:

1. By the defendant the Baltimore & Ohio Railroad Company:

2,119,604 lbs. at 3c	$635.89
42,124 lbs. at 4½c	17.69
	$653.58

2. By the defendant the Central Railroad of New Jersey, 132,060 lbs., at 3c	$39.62
3. By the defendant the Delaware, Lackawanna & Western Railroad Company, 37,282 lbs. at 3c	11.18
4. By the defendant the Erie Railroad Company, 160,808 lbs. at 3c	48.25
5. By the defendant the Lehigh Valley Railroad Company, 267,867 lbs., at 3c	80.36
6. By the defendant the New York, Ontario & Western Railway Company, 74,955 lbs. at 3c	22.49
7. By the defendant the Pennsylvania Railroad Company, 4,625,086 lbs. at 3c	1,387.52
Total	$2,243.00

72

EXHIBIT F.

Before the Interstate Commerce Commission.

FEDERAL SUGAR REFINING COMPANY OF YONKERS
vs.
BALTIMORE & OHIO RAILROAD COMPANY ET AL.
} Docket No. 2888.

Erie Railroad Company, answering the complainant's petition herein, respectfully states:

First. On information and belief this respondent admits the allegations in Paragraph I of said petition.

Second. This respondent admits that it is a common carrier engaged inter alia in the transportation of property by railroad between points in the States of New York, New Jersey, Pennsylvania, and Ohio, and that as such common carrier it is subject to the act to regulate commerce, approved February 4th, 1887, and the acts amendatory thereof and supplementary thereto, insofar as said act and its said amendments and supplements are in conformity with the Constitution of the United States.

Third. This respondent admits that it maintains a station in Jersey City, New Jersey, at which it receives freight for transportation as a common carrier as aforesaid, and from which it makes delivery of freight which it has so transported; it denies that it is advised

73 or that it has been able to ascertain what complainant means by the use of the term "rail terminals" as used in Paragraph III of said petition, and it is therefore unable to make specific answer to the allegation with reference thereto contained in said paragraph; but it avers that in addition to the station maintained by it in Jersey City, New Jersey, as aforesaid, it also maintains various other stations in and about New York Harbor, located at certain points in the Boroughs of Manhattan, Brooklyn, and Bronx in the city of New York, as appears in the tariffs duly filed by it with the Interstate Commerce Commission and published according to law; that at those stations it also receives freight for transportation, and that from those stations it makes delivery of freight which it has transported; and it further avers that within certain of those terminal stations are maintained rails and tracks

over which engines and cars are operated by it for beginning and completing the transportation of freight handled by it through such stations.

Fourth. On information and belief this respondent admits that complainant has an office at 138 Front Street, Borough of Manhattan, city of New York, and it avers that complainant's refinery is located at Yonkers, New York, a point outside the lighterage limits of New York Harbor. On information and belief it avers that, as complainant alleged in paragraph I of its petition in the former proceeding before this Commission, docket 1082, complainant's principal place of business is at Yonkers; that the interstate transportation of the product of complainant's refinery actually begins at Yonkers, New York, and that the alleged arrangement whereby the product of complainant's refinery is said to be billed from complainant's office
74 at 138 Front Street, New York City, and the interstate transportation of said product is alleged to begin at Pier 24, North River, Borough of Manhattan, is a mere subterfuge, and that such interstate transportation does not in fact begin at Pier 24, North River. On information and belief this respondent further avers that the aforesaid alleged arrangement has been adopted by complainant in part for the purpose of evading the decision of this Commission in the former proceeding, docket 1082, and in part to provide a basis for the instituting of this proceeding.

Fifth. On information and belief this respondent admits the allegations contained in paragraph V of said petition.

Sixth. On information and belief this respondent admits that John Arbuckle and William A Jamison are the members of a co-partnership conducting a terminal and lighterage business under the firm name and style of "Jay Street Terminal"; that the docks of said Jay Street Terminal are located at the foot of Jay Street, Borough of Brooklyn, and that said docks are in the vicinity of the sugar refinery owned and maintained by the firm of Arbuckle Brothers, and it admits that said Jay Street Terminal has the necessary and adequate equipment for conducting said terminal and lighterage business and for receiving, handling, and transporting freight by water.

Seventh. This respondent avers that the aforesaid Jay Street Terminal is a public station regularly designated by this respondent in its tariffs as a place for the receipt and delivery of freight; that in its said tariffs it duly prescribes rates for the transportation of freight to and from said station; that at said station it receives freight
75 from and delivers freight to the general public, including Arbuckle Brothers, and that while the physical transportation of freight offered at and delivered from said station between said Jay Street Terminal and this respondent's station in Jersey City is performed in the lighters of and by the tugs of said Jay Street Terminal, the transportation of such freight is actually performed by this respondent through the agency of said Jay Street Terminal, and that for conducting the said public station, collecting charges from the public, and performing said transportation between Jay Street

Terminal and this respondent's Jersey City station for it this respondent pays to said Jay Street Terminal the rates of compensation as stated in paragraph XI of said petition.

Eighth. This respondent admits that Pier 24, North River, and Jay Street Terminal are within the free lighterage limits of New York Harbor, but it denies that the initial point of the transportation of the products of complainant's refinery is now at said Peir 24, North River, and avers that said initial point of shipment is the same to day as it was when the prior proceeding under docket No. 1082 was brought before this Commission, to wit, Yonkers, New York, where complainant's refinery is situated.

Ninth. This respondent denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XIII of said petition, and therefore prays that if said allegations be denied to be material, complainant be required to make due proof thereof.

Tenth. This respondent admits that it refuses to make any compensation to complainant for lightering the product of complainant's Yonkers refinery, alleged to be lightered from Pier 24, North River.

76 Eleventh. This respondent denies that complainant's petition or Schedule A thereof contains sufficient information to enable it to determine whether between July 20th, 1909, and September 1st, 1909, it transported for complainant the quantity of sugar referred to in said Schedule A, and it avers that it will continue to be unable to determine whether it did perform said transportation as long as complainant fails and neglects to furnish specific billing references to the shipments of sugar referred to in said Schedule A, or with sufficient information to enable it to locate record thereof; but it avers that if during said period it did perform such transportation, it did so at the rates and under the regulations prescribed in the tariffs duly filed by it with the Commission and publsihed according to law, and this respondent denies that it has unduly or unjustly discriminated against complainant in violation of the act to regulate commerce or its amendments or supplements, as is alleged in said petition or otherwise.

Twelfth. This respondent denies each and every other allegation in said petition which has not hereinbefore been specifically admitted or denied, or otherwise answered unto.

Thirteenth. This respondent avers that complainant's said petition raises questions which have been determined against complainant in a proceeding before this Commission, entitled "Federal Sugar Refining Company of Yonkers versus Baltimore & Ohio Railroad Company and others, docket No. 1082," decided June 24th, 1909, and that the petition herein contains no allegations which were not before this Commission in that proceeding and therein passed upon by it with the exception of the allegation that the interstate transportation of complainant's shipments originates at Pier 24,
77 North River, which allegation this respondent avers to be

irrelevant and immaterial and not in accordance with the facts as above set forth.

Wherefore, Erie Railroad Company prays that as to it complainant's prayer for reparation be denied; that complainant's petition be dismissed and that this respondent have such other and further relief as this Commission may deem to be just and reasonable.

NEW YORK, N. Y., *October* , *1909*.

ERIE RAILROAD COMPANY,
By D. L. GRAY,
Asst. Frt. Traf. Manager.

GEO. F. BROWNELL,
Attorney for Erie Railroad Company.

78 EXHIBIT *G*.

Before the Interstate Commerce Commission.

No. 2888.

FEDERAL SUGAR REFINING COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Decided December 5, 1910.

Report and order of the Commission.

No. 2888.

FEDERAL SUGAR REFINING COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Submitted April 13, 1910. Decided December 5, 1910.

1. A carrier is not warranted under section 15 of the act in making an allowance to one shipper who provides a facility and performs a service in the transportation of his own property, while refusing a similar allowance to another shipper, competing in the same markets and in the same line of business, who provides a similar facility and performs the same service in the transportation of his property.

79 2. The allowances paid by the defendants on the sugar brought by Arbuckle Brothers on floats and lighters to their regular freight stations on the Jersey shore, no allowance being paid to complainant on sugar brought by it on lighters to the same stations, result in inequalities, preferences, and discriminations and are unduly prejudicial to the complainant as a shipper over the defendants' lines in competition with Arbuckle Brothers in the same markets.

3. The fact that Arbuckle Brothers operate their dock in Brooklyn as a terminal for the defendants does not justify an allowance to them for lightering their sugar to the regular stations of the defendants on the Jersey shore so long as an allowance to the complainant for lightering its sugar to the same stations from Pier 24 is refused.

4. A receiving station operated for carriers by a competitor in the same line of business is not a reasonable facility of transportation to offer a shipper.

Ernest A. Bigelow for complainant.

H. A. Taylor, Douglas Swift, and Edgar H. Boles for defendants.

Report of the Commission.

HARLAN, Commissioner:

The general facts involved in this controversy were first brought to our attention in a proceeding under the same title reported in 17 I. C. C. Rep., at p. 40, where the Commission was divided, one member supporting the order then entered on the special grounds explained in his concurring opinion, while three members joined in a dissenting opinion. This complaint, presented not as a supple-
80 mental petition in the first proceeding, but as an original
complaint, comes before us on an additional record and upon a new state of facts. We are also asked in this connection to consider a petition for a rehearing of the former complaint.

A careful examination of the report of the majority in the original case and of the concurring and dissenting opinions will conduce to a more accurate understanding of the case as well as the grounds on which were based the divergent views entertained in the Commission upon the facts then before us. In disposing, however, of this new complaint, it is our purpose to state the facts as they now appear and to consider the case de novo and upon the record as it now stands.

Among the several corporations and copartnerships engaged in the refining of sugar in and about the harbor of New York City the only ones that we are concerned with at this time are the complainant and a copartnership widely known as Arbuckle Brothers, which owns an extensive property at the foot of Bridge Street in the city of Brooklyn having a frontage of 1,200 feet on East River and locally known among the shippers that use it as the Jay Street Terminal of the defendants. Under a contract with the defendant carriers Arbuckle Brothers operate the property as a freight station for the defendants. For that use of the dock and for their services in conducting it as a freight station and in floating and lightering shipments between the dock and the regular terminals of the defendants in Jersey City, Arbuckle Brothers receive from the defendants allowances ranging from 3 to 4½ cents per 100 pounds on all merchandise passing through the terminal, whether inbound or outbound. The floats and barges used in this service are owned by Arbuckle Brothers and all persons employed in the handling of the freight, on
81 the water as well as on the dock, are on the pay rolls of that
firm.

The property immediately adjoining the dock property is also owned by Arbuckle Brothers, and on it they have erected a large sugar-refining plant. No less than one-third of all the merchandise handled through the dock by Arbuckle Brothers in their capacity, as is here contended, as agents of the defendants is sugar manufactured and owned by Arbuckle Brothers in their capacity as refiners and shippers of sugar. As shippers Arbuckle Brothers daily deliver at the Jay Street Terminal a large tonnage of refined sugar for carriage to various interstate points of consumption. It is contended here that they receive their own sugar on their own dock as agents of the defendant carriers. In lighters or on floats, owned by them, but which, it is claimed, they operate as agents of the defendants, they carry their own sugar thence to the regular freight-receiving stations at the rail ends of the defendants on the Jersey shore. On every 100 pounds of sugar thus delivered at the Jay Street Terminal by Arbuckle Brothers, as shippers, to Arbuckle Brothers, as agents of the defendant carriers, and lightered by them in the latter capacity, as is contended, across the river to the defendants' depots, Arbuckle Brothers receive, as heretofore stated, an allowance of from 3 to $4\frac{1}{5}$ cents. They receive similar allowances on the merchandise of other shippers handled through the Jay Street Terminal in the same manner. It may be well here to add that the defendants assert that the Jay Street Dock was made a railroad terminal in order to provide a freight station for the shipments of manufacturers and merchants in Brooklyn who have no dock of their own. And it is true that a substantial tonnage, said to be about two-thirds of the total tonnage now passing through the terminal, is of that character.

82 The complainant, the Federal Sugar Refining Company, is also a refiner of sugar and competes with Arbuckle Brothers in supplying that commodity to consumers in the interstate communities reached by the defendants and their connections. Its refinery is located at Yonkers. Adjacent to and connected with it the complainant owns a pier or dock. Yonkers, however, is outside the lighterage limits established by the defendants in New York Bay and the two rivers, which together form what we have referred to as the harbor of New York; and the complainant therefore does not enjoy from its dock the benefit of the free-lighterage service offered by the defendants, under their tariffs, to shippers to and from piers that are within the limits. It is said that the complainant may reach the destinations in question, and in most instances at the same rates, by delivering its sugar to the New York Central at Yonkers, whence it can be carried to Sixtieth Street and floated across the harbor to the receiving stations of the defendants on the west side of North River. It is asserted, however, and this we take to be established of record, that, for various reasons and because of delays in the handling of shipments, the complainant has found by actual experience that it can not successfully meet the requirements of its patrons by using that route, and it has been compelled to find other

means for delivering its refined sugar to the defendants at Jersey City. It has therefore entered into an arrangement with the Ben Franklin Transportation Company for lightering its sugar to the same freight depots of the defendants west of the river to which Arbuckle Brothers lighter their sugar.

Under the arrangement in effect at the time its first petition
83 was before us the sugar was lightered by the Ben Franklin
Transportation Company directly from the complainant's dock at Yonkers to the defendants' freight depots on the Jersey shore. But since our report in that proceeding was announced the method of handling the traffic has been changed, and the arrangement upon which this complaint is based was agreed upon and carried into effect by the two companies. It becomes necessary, therefore, at this point to explain the conditions under which the complainant's sugar now reaches the defendants at their receiving stations west of the river.

Since its incorporation in 1907 the complainant has maintained its general offices at 138 Front Street, in the city of New York, where all its accounts and records are kept, except such as pertain to the actual operation of the refinery at Yonkers. Here its president and other executive officers and their subordinates are located and the actual business of the company is conducted. The only employees at the refinery are those engaged in the operation of the plant, including the superintendent, the checkers, weighers, samplers, shipping clerks, etc. The books kept at the refinery are tally books, weighers' books, samplers' books, records of meltings, and similar documents and papers that pertain to the actual conduct of the refinery. The records of the financial operations of the company, the sales of its products, and all its general correspondence are kept at the general offices.

For fifteen years the Ben Franklin Transportation Company has been a lessee of a portion of Pier 24, in North River, at the foot of
Franklin Street, the other portions of the pier being rented to
84 other water lines. It is an independent company engaged in a
general lighterage and towing business on the Hudson River. It seems not to be affiliated, either in fact or in origin, with the complainant and to have no intercorporate relations with it. One of its officers is said to own 10 shares of the common stock and 170 shares of the preferred stock of the complainant company. With that exception, which may be disregarded as having no significance, the only relation between the two enterprises rests on the contract between them under which the transportation company undertakes to lighter the sugar of the complainant, first to Pier 24 and thence, as it may be directed, to the Jersey City terminals of the defendants and to receiving stations of other water and rail lines. This work is carried on by it substantially as follows:

A lighter reports every morning at the dock of the complainant at Yonkers and receives such sugar in barrels, boxes, or other packages as may be ready for shipment. The superintendent of the refinery,

having been previously advised from the company's general offices in New York City of the quantity of sugar required in order to fill accepted contracts, has the sugar ready at the stringpiece and it is loaded into the lighter by employees of the transportation company. The officer in charge of the lighter gives a receipt for the shipment and in return is handed a document showing the complainant as the consignor at Yonkers and the consignee at 138 Front Street. It also gives the contract numbers, together with the weight and description of the packages. The lighter then proceeds with its load to Pier 24, which, as heretofore stated, is within the lighterage limits. It is there made fast to the dock and notice of its arrival is given at
85 the general offices of the complainant. Thereupon the complainant issues shipping instructions to the transportation company and hands to its representative a bill or bills of lading for execution by the defendant carriers upon the delivery of the sugar on the Jersey shore. Upon receiving these instructions and the bills of lading the lighter proceeds to the freight depots on the Jersey side and there makes delivery of its cargo by unloading the sugar upon the car platforms of the carrier or carriers named in the lading papers. The bills of lading are executed by the carriers and returned to the lighterman.

For its services in taking the sugar first to Pier 24 and then, after receiving instructions and the bills of lading, in carrying it across the river and making delivery at the rail ends of the defendant carriers, the Ben Franklin Transportation Company, under its contract with the complainant, demands and receives 3 cents per 100 pounds. As Arbuckle Brothers receive from the defendant carriers an allowance of from 3 to $4\frac{1}{5}$ cents per 100 pounds upon delivering their sugar across the river at the same freight depots, the complainant contends that the defendant carriers subject it to an unlawful discrimination when they decline to make it similar allowances for delivering its sugar to the defendants at the same place and in the same manner. That is the point of controversy to which our attention has been directed in both these proceedings. On the record in the former proceeding, as heretofore explained, it appeared that the lighterage movement commenced at Yonkers, which is outside the lighterage limits. On the record now before us the complainant contends that the lighterage movement to the receiving stations west of the river commence at Pier 24, where the complainant gives its shipping instructions to the lighterage company. Without entering here
86 upon any discussion of the importance of the fact in the disposition of this proceeding, it will suffice to say that we accept the complainant's contention that the sugar is now being lightered to the defendants at Jersey City from Pier 24, which is inside the lighterage limits. The lighter is actually made fast to that pier when it arrives from Yonkers; sometimes a portion of its cargo is discharged there and held in storage, presumably for local use; the lighterman has no authority to go further for any instructions for a further movement, and must wait there for authority and instruc-

tions; upon receiving orders he lighters the cargo as directed, sometimes to one station and sometimes to another, the cargo not infrequently being divided among the several receiving stations across the river, or being delivered to water lines or railroads other than the defendants, all in accordance with the instructions received at Pier 24.

The one fact that stands out prominently upon this statement of the case is that it costs the complainant 3 cents per 100 pounds to tender its sugar to the defendants at their regular receiving stations on the Jersey shore, being the points where the actual rail transportation begins, while the defendants relieve Arbuckle Brothers of any such expense by paying them the ample allowances heretofore mentioned. Around this fact the whole controversy turns. As manufacturers and shippers of sugar, the complainant and Arbuckle Brothers are competitors in the markets reached by the defendants. Under the arrangement heretofore described, the defendants return to Arbuckle Brothers the full cost, and apparently something more than the cost, of lightering their sugar across the river. They refuse to bear this burden for the complainant. And the question is whether this condition of affairs, as between the two competing shippers, results
87 in an undue and unjust prejudice and disadvantage to the complainant. In its actual financial and commercial results there can be no doubt that the complainant is at a disadvantage in competition with Arbuckle Brothers, with an adverse margin against it of from 3 to 4⅕ cents per 100 pounds. But is it as a matter of law such an undue and unjust prejudice and discrimination as is condemned and made unlawful by the act?

In support of the agreement between the defendants and Arbuckle Brothers it is urged that the defendants require a freight station on the Brooklyn shore, and that the dock belonging to Arbuckle Brothers is well situated for the purpose, and is, and has been, and in the future will continue to be, a convenience to shippers. This may be conceded without being conclusive either as to the legality or the good faith of the relations at present subsisting between the defendants as carriers and Arbuckle Brothers as shippers. In the past, as we know from various investigations and from an examination of old tariffs, Havemeyer & Elder, the predecessors of the American Sugar Refining Company, the dock of which is also involved in this proceeding, for many years enjoyed illegal preferences at the hands of the carriers. It is also our understanding that when Arbuckle Brothers began to compete with the Havemeyer refineries these allowances were extended to them, apparently under some sort of verbal arrangement. It was not until after the enactment of the so-called Elkins law that the lighterage allowances on sugar from the Arbuckle piers seem to have been published. They were then limited to sugar and coffee, being the commodities in which Arbuckle Brothers were interested; and they were paid, as the tariff states, "on account of the peculiar physical situation at the water front adjacent to the Arbuckle refinery," a statement that has not been satisfactorily explained to

88 the Commission, although commented upon at the hearing. The allowances at both piers seem, therefore, to have had their origin in an unlawful preference of these great shippers. Apparently it was not until some years afterwards that the two piers were made public receiving stations of the defendant carriers. And it is sought to justify the allowances now paid to Arbuckle Brothers and the withholding of similar allowances to the complainant on the ground that a substantial use is now made of the Arbuckle dock as a public terminal for handling the traffic of other shippers. It is contended that the allowances are unobjectionable at this time, either upon moral or legal grounds, because Arbuckle Brothers, as agents of the defendants, are now handling the merchandise of other shippers through their dock, and therefore may lawfully receive allowances on their own shipments as well as upon the shipments of others.

It is our observation that such arrangements are rarely entered into with small shippers, but usually only with shippers that are financially strong and control a large traffic. As is pointed out in the dissenting opinion in the first of these proceedings (17 I. C. C. Rep., at p. 51), an instance of this nature was developed in the investigation entitled "In the matter of allowances for transfer of sugar," 14 I. C. C. Rep., 619. It appeared in the course of that inquiry that the Pennsylvania Railroad Company has a wharf in Brooklyn immediately adjoining the Brooklyn Eastern District Terminal, a property of the Havemeyers, who were said to be closely affiliated with the American Sugar Refining Company. This dock will be considered later in this report. It will suffice at this point to say that in the investigation referred to the freight-traffic manager of the Pennsylvania Railroad Company frankly admitted that his company, notwithstanding the proximity of its own dock, had made the
89 Brooklyn Eastern District Terminal its terminal also, and in
order to get a share of the sugar tonnage of the Havemeyer refinery had agreed to pay lighterage allowances on sugar shipped from that dock. Defining the transaction in the plainest terms, the Pennsylvania Railroad Company simply purchased its part of the traffic of that very extensive shipper: and in view of the allowances then being made by other carriers it could get a portion of the tonnage in no other way. This matter, as well as the fact that the original allowances given to the Arbuckle Brothers were limited to sugar and coffee, the commodities in which they deal, are here recalled for the purpose of emphasizing what seems to be clearly established by the records of the Commission, namely, that the allowances were originally extended to these large shippers in order to put them on a preferred basis. It was not until after the regulating body had been strengthened by additional legislation that the two docks seem to have been designated in the published tariffs of the defendants as railway terminals and were thus made to subserve the convenience of such of the general shipping public in Brooklyn as might be able to use them.

These dock properties may make convenient terminals for a substantial amount of general traffic, but it is somewhat singular that

with the entire Brooklyn River front available, and much of it equally convenient, the two docks, one directly owned by Arbuckle Brothers and the other by persons having supposedly very close relations with the American Sugar Refining Company, apparently the only sugar refineries now in operation in Brooklyn, should have been selected for railroad terminals. The explanation lies undoubtedly in the fact that sugar moves west bound from New York City in larger volume probably than any other commodity; indeed,
90 we were recently advised in another connection by the well-
informed general counsel of one of these defendants that sugar constitutes almost one-third of all the traffic moving westward from that point of origin. If this estimate is even approximately accurate, it was a traffic that skillful shippers could readily turn to their advantage under the demoralized conditions prevailing when these allowances were first paid. Under the better conditions now generally prevailing it is a traffic that the defendants ought to be prepared to receive and handle with their own facilities. But, instead of acquiring or renting these or similar dock properties and operating them as terminals with their own employees, they have contracted for their operation by these great shippers and interests that are closely allied with great shippers. And, notwithstanding the very extensive fleet of tugboats and barges owned and used by the defendants in the harbor of New York, contracts have also been made with the private interests that own the two docks to do the lightering. It is impossible to conclude on all the information before us that these continued relations between the defendant carriers and great shippers and interests closely allied and largely identified with great shippers are wholly disinterested, however much of a convenience the docks may now be to some of the general shipping public.

It is also urged that the investment of Arbuckle Brothers in their dock property approximates $1,200,000, and that the net earnings from its operation in 1907 as a terminal for the defendants amounted to but $35,566.84, this being only slightly in excess of 3 per cent on the investment, nothing being allowed for interest and depreciation. Net earnings, as everyone knows, vary with the character and extent of the items embraced on the expense side of the account. But
91 the accuracy of these figures may be admitted without bringing
us any nearer to a solution of the problem presented to us by the complainant. The fact will still remain that Arbuckle Brothers, as shippers of sugar over the lines of the defendants, enjoy a substantial advantage over its competitor, a shipper of sugar over the same lines to the same destinations. As owners of a dock property that is doubtless growing rapidly in value, their arrangement with the defendants enables them to hold and carry it at a substantial net profit and at the same time reimburses them for the cost of delivering their sugar to the defendants on the west shore of the river for carriage to interstate destinations. The defendants decline to reimburse the complainant for the cost of delivering its sugar at the same receiving stations under substantially similar conditions.

But we are told that if the defendants should now purchase the Arbuckle dock and operate it as a freight station with their own agents and employees, and do the floating and lightering across the river with their own equipment, the Arbuckle refinery would still have the advantage of its proximity to the dock, and Arbuckle Brothers would still have their lighterage done free of charge, as would all other shippers to and from that terminal; while the complainant would continue under the disadvantage of having to lighter its sugar from Yonkers either to the regular receiving stations of the defendants west of the river or to the Jay Street Terminal, or to some other point within the lighterage limits where the sugar would be accessible to the free-lighterage service now performed in New York Harbor by the defendants. And this is regarded as a conclusive demonstration that the discrimination alleged by the com-
92 plainant can not be undue, as this phrase is used in the act.
The discrimination, it is said, can not be undue or unjust under the act when by a mere change in the title of the dock property, from the alleged preferred shipper to the carriers, the discrimination would be eliminated while the complaining shipper would be left in precisely the position in which it now is. There is only an apparent force, however, in that point of view. As well might it be said that the payment to a shipper of an unlawful rebate is not an undue preference because, if stopped, the competitor will still be under the obligation of paying the lawful rate. Moreover, the tendency of the suggestion is to favor such relations between carriers and particular large shippers, when in the general interest such real-tions ought to be discouraged. Under that view a carrier desiring the traffic of a large shipper may relieve him of his expense for teaming by making his warehouse a terminal depot and himself an agent for teaming his own shipments to its regular station, as well as the shipments of others that find it convenient to use the new depot. And, as we are told, it would suffice to say of such a condition of affairs that it could be no undue discrimination against the competitors of the favored shipper, because, if the ownership of the warehouse should pass from the favored shipper to the carrier, his competitors would still require teams for delivering their shipments either at that depot or at the carrier's regular receiving station.

We can not accept that as a controlling view of such a state of facts as is here shown to exist. A carrier may doubtless wrongfully give a great shipper a substantial advantage by buying or renting his warehouse adjoining his factory or place of business and making it a public receiving station, thus relieving him of the expense of hauling his merchandise by wagon to its regular receiv-
93 ing station. And possibly under the act as it now stands we
would be powerless to redress the wrong, if the public made actual use of the new station, unless the price paid or the rent reserved were excessive and the transaction was therefore intended as an unlawful rebate as well as a continuing daily advantage to that shipper. But when the carrier engages the shipper to operate

his warehouse as a railroad terminal and in the arrangement gives him advantages in handling his own traffic that are denied to his competitor, the test proposed, as above described, does not satisfy the principles underlying the act, as we shall see more fully later in this report.

The complainant contends that in lightering their sugar to the Jersey shore and there delivering it to the defendants, Arbuckle Brothers perform what the complainant refers to as a purely accessorial service. We incline to think this a sound view of the matter upon the facts shown of record. Neither the actual possession of their sugar nor their relation to it is in any respect changed until it is delivered into the physical possession of the defendants at Jersey City. This fact is clearly developed upon the record. Arbuckle Brothers handle the sugar out of their own refinery to their own dock and themselves deliver it to the defendants west of the river, using in the process only property and facilities that are owned by them and employees that are paid by them. Moreover, under the terms of the contracts between them and the defendant carriers none of the duties, obligations, responsibilties, or liabilities of common carriers attaches to the defendants, with respect to the sugar of Arbuckle Brothers, until the defendants have actually received it at their regular freight stations west of the river. Yet it is here contended
94 that, through some sort of alchemy in their provisions, these contracts transmute Arbuckle Brothers from shippers into carriers' agents while they are in the act of delivering their own sugar to themselves at their own dock. We are not necessarily controlled, however, by the face of those documents or by the merely superficial relation that they purport to establish between these shippers and the defendant carriers if, as seems to be abundantly clear upon a reading of their provisions, the real and actual relation of Arbuckle Brothers to the defendants, so far as their own sugar is concerned, is that of shippers up to the moment of time when they physically deliver their sugar to the defendants on the Jersey shore. The contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk, and only from that moment does the carrier's risk begin. It is only when the defendants actually accept and physically take possession of the sugar at their receiving stations west of the river that they agree to, and do in fact, assume the liabilities of common carriers with respect to the sugar of Arbuckle Brothers. Much, therefore, may be said in support of the theory that at that point and at that moment is the relation of shipper and carrier between the defendants and Arbuckle Brothers actually established, and that only at that moment of time do the mutual liabilities and responsibilities attending that relation spring into being.

When the real essence and meaning of the contracts are arrived at there seems to be no substantial difference in the manner in which the defendant carriers accept the complainant's sugar and the manner in which they accept the sugar of Arbuckle Brothers for trans-

portation. Both companies deliver their merchandise to the defendants on the Jersey shore at their own risk, one from Jay Street
95 and the other from Pier 24, one in lighters that it owns and the other in lighters that it hires. At that point and at that moment of time the liability of the defendants as common carriers for both shippers commences. Up to that point there is no "transportation" of the sugar, as the complainant contends, but only an accessorial service by each shipper in delivering its own merchandise to the carrier for transportation. It is then that an actual contractual relation between the two refining companies as shippers and the several defendants as carriers is entered into. If, therefore, we are to disregard, as necessarily we must if this act is to be enforced in its letter and spirit, the merely superficial relation sought to be created on the face of the contracts in question, and turn our attention to the actual relation that they es'ablish, the only difference, upon a most careful analysis, between the complainant with respect to its sugar and Arbuckle Brothers with respect to their sugar is that under the contracts Arbuckle Brothers are called the agents of the defendants when handling their own sugar, and get an allowance for delivering it to the carriers across the river, while the complainant does the same thing and gets no allowance, but makes the delivery at its own expense. The fact that Arbuckle Brothers ordinarily load their sugar into cars on the dock and sometimes float empty cars across the river for loading seems to be a mere incident to the preferred basis upon which they have been put as shippers over the defendant lines, and can not be regarded as materially differentiating them and their sugar from the complainant and its sugar shipments.

"But," says the defendants in substance, "we have converted the dock of Arbuckle Brothers into a regular freight station, and there receive a large tonnage from other shippers which Ar-
96 buckle Brothers, at our expense, lighter to our rail ends west of the river. We shall be glad to have them do this for the complainant, if it will deliver its sugar to us at the Arbuckle dock." This suggestion has not made a favorable impression upon us. To offer the complainant a receiving station on the dock of powerful competitors, where its shipments would be handled and billed out by the competitors, thus exposing to them the names of the complainant's customers, it markets, and the course of its business, is a suggestion that overlooks the duty of impartial service by the defendants to all their shipping public. Moreover, under recent amendments, the law has thrown its protection around the shipper, and in express terms makes it unlawful for an interstate carrier to "disclose his business transactions to a competitor." And if effect is to be given to this wholesome principle, the complaint can not be said to be satisfied by the tender to the complainant of the Arbuckle dock as a receiving station for its sugar, and the tender of Arbuckle employees, as agents of the defendants, to make out the lading papers and other transportation records, to assess and collect the freight charges, and to handle the complainant's sugar to the defendants'

freight stations on the west shore. To throw a shipper in this manner into the hands of competitors in the same line of business is utterly at variance with fairness as well as with the express provisions of the law. It is true that there may be traffic as to which such a state of affairs would make little difference. But we think it clear that the Arbuckle dock may no more be regarded as a reasonable freight depot for the complainant than would the Brooklyn Eastern District Terminal, operated in the interest of the American Sugar Refining Company, be tolerated by Arbuckle Brothers as a
97 freight station of the defendants. If its refinery were immediately across the street the complainant could not be expected to accept the Arbuckle dock as a receiving station of the defendants so long as it is operated by competitors in the same line of business. A receiving station operated by a competitor is not a reasonable facility of transportation to offer to any shipper.

So far as the general shipping public is concerned, the Arbuckle dock may doubtless now be regarded as a public receiving station of the defendants. But if, for the reasons stated, it is not entitled to be regarded as a public receiving station so far as the complainant and its sugar are concerned, may it be regarded as any other than the private dock of Arbuckle Brothers when they, as shippers, and their own sugar are concerned? If it is operated under conditions that prevent it from being a legal receiving station for all shippers of sugar that might care to use it, we do not see how it may fairly be regarded as a public receiving station of the defendants for the sugar of Arbuckle Brothers. We have therefore been inclined, as heretofore stated, to regard the lightering of their own sugar across the river as an accessorial service by Arbuckle Brothers from their private dock, and not as a service of transportation from a public receiving station of the defendants. And this view of the matter is emphasized by the contracts, heretofore alluded to, which attach to the defendants a liability as common carriers of Arbuckle sugar only from the moment of time when they actually receive possession of it at their regular station west of the river. It is not necessary, however, to draw fine distinction between an accessorial service and a service of transportation, as applied to the facts in this case. If the allowances made by the defendants subject the complainant to an undue discrimination, or give Arbuckle Brothers, their com-
98 petitors, an unjust preference, a wrong is being done that must be redressed by an appropriate order, whether the allowances are paid as for an accessorial service or for a service of transportation. We shall therefore now consider the matter briefly from the latter point of view.

Arbuckle Brothers not only operate their dock for the defendants as a railway facility, but they also perform the lighterage service between the dock and the regular stations of the defendant on the west shore. And the defendants insist that the sugar of Arbuckle Brothers, like the general merchandise of other shippers received at their dock, commences to move at that point; and that when Arbuckle

Brothers lighter their own sugar across the river they are simply performing a service of transportation with facilities of their own furnished by them for the purpose. The defendants point out that the only way they have of serving the cities of New York and Brooklyn is by a lighterage system radiating to all points within the limits that they have established in the harbor of New York; and that under their lighterage tariffs they are common carriers to and from every dock and pier within those limits. Their view, then, is that the Arbuckles have the right, instead of using their own dock, to tender their sugar to any one of the defendants at any other dock, whether public or private, within the established limits; and to require that defendant, upon the payment by them of the New York rate, to float or lighter it to its regular receiving station on the Jersey side; and therefore if the defendants, by their published tariffs, have placed themselves under the duty of lightering the Arbuckle sugar from the New York side at the New York rate, that service, when performed by one of the defendants, is a part of its transportation service
99 from that side of the river. The conclusion necessarily following these premises, as the defendants thereupon insist, is that the lighterage when performed by the Arbuckles themselves is also a service of transportation and not an accessorial service, and therefore may be paid for by the defendants under section 15 of the act on a just and reasonable basis.

We had not regarded section 15 of the act as a warrant to a carrier for making an allowance to one shipper providing a facility and performing a service in the transportation of his own property, while refusing a similar allowance to another shipper providing a similar facility and performing the same service in the transportation of his property. Nor had we understood that a carrier, while giving to one shipper the privilege of providing a facility and performing a service in the transportation of his property, could refuse the same privilege to another shipper and compensate the former while refusing any allowance to the latter. Nor is that the law. Certainly it can not be the law when the two shippers are competitors in the same line of business and in the same markets. If the defendants accord Arbuckle Brothers the privilege of lightering their sugar from their dock and make them an allowance therefor, we regard it as axiomatic, under the principles of this legislation, that they must accord a like privilege and make a like allowance to the complainant from Pier 24, the complainant being a competitor in the same line of business and reaching the same markets of consumption. Indeed, we see little ground, upon the facts now before us, for denying the privilege and the allowances to the complainant from the point where its sugar crosses the lighterage limits established by the defendants. That, however, is a question that need not be discussed, for we have
100 found that the complainant now lighters its sugar from Pier 24, which is within the lighterage limits.

The defendants, however, insist that the provisions of section 15 need not necessarily have so broad a construction. Their view is

that the privilege of furnishing the facilities and performing a part of the transportation service may be accorded, and the payment therefor made, to one shipper without laying the carrier under the obligation of according the same privilege and making a similar payment to another and competing shipper who provides a similar facility and performs a similar service in the transportation of his property. "If the Jay Street Terminal," they declare, "is to be operated as a public station, the handling of the Arbuckle shipments through the terminal and by the equipment of the terminal (i. e., by the Arbuckles), as all other shipments are handled, must be viewed as a natural incident to that operation." Inasmuch as the Jay Street Terminal has been established "it should be open," they say, "to all shippers without discrimination. * * * To require the Arbuckles to deliver their shipments at some point distant from the terminal, there to be picked up and transported to the Jersey terminal by railroad equipment, would be a strained and unnatural proceeding and a discrimination against the Arbuckles." It would be equally strained, as we are told, to require the defendants, after having made the Arbuckles their agents in operating the Jay Street Terminal, to set aside that arrangement with respect to the Arbuckle sugar and handle it with railroad employees and with railroad equipment. This, they say, would be both inconvenient and expensive. From that point the argument of the defendants proceeds easily and rapidly to the proposition that when a carrier, by an agreement with
101 a great shipper, turns his dock into a railroad terminal and
has it operated for it by the shipper, the circumstances and conditions surrounding that shipper and his particular traffic differ from the circumstances and conditions surrounding another shipper, although competing in the same line of business, "who does not furnish public terminal facilities for the carrier"; and that such a situation justifies the carrier "in permitting the shipper who operates a public terminal for it to perform such terminal service on his own shipments while refusing to permit a shipper who does not operate a public terminal to perform a similar part of the transportation service." In other words, as we gather the point of view of the defendants, the very arrangement that makes a railroad terminal of the dock owned by, and adjoining the refinery of, these shippers, and saves them the cost of teaming or otherwise conveying their immense traffic to a public terminal operated by the carriers themselves, also erects around those shippers a bulwark of dissimilar circumstances and conditions that justifies the carrier in giving them the further privilege of providing their own facilities for lightering their shipments across the river, thus performing also a part of the transportation service and being compensated therefor by ample allowances, while the privilege is withheld from another shipper who is their competitor in the same line of business.

That contention can not be admitted as sound. On the contrary, we hold that when a carrier undertakes to have such a terminal operated for it by the owner of the property and the owner happens also

to be a large shipper over its line, the law reads into the agreement between the carrier and the owner the peremptory requirement that the arrangement shall not result in any undue and unjust discrimination against other shippers competing with the owner in the
102 same line of business. The prohibition of inequalities among shippers is perhaps more fundamental and vital than any other feature of the act. And when a carrier undertakes to supply its needs by private contract with a shipper—whatever may be its purpose, and however plainly it may be grounded in good faith, or however clearly it may spring from the practical necessities of the carrier—by giving him certain opportunities and advantages in the handling of his traffic over its lines, those opportunities and advantages may not lawfully be withheld from his competitors. However straightforward the relation between a carrier and a shipper may be, it is essentialy wrong, and violates the provisions of the statute against preferences and discriminations when the carrier endeavors under such a private contract to turn the shipper into its agent, and thus, whether purposely or incidentally, gives him privileges and advantages in connection with the transportation of his property that are withheld from his competitors. If such a transaction is conceived in bad faith and works unlawful results, it is manifestly unlawful. But good faith will not save it from like condemnation if it involves preferences and discriminations that are undue and unjust. It is not the intention of the parties but the actual results that flow from the arrangement that constitute the tests. And we find that the terms under which the defendant carriers accept the sugar of Arbuckle Brothers at their regular stations west of the river do result in inequalities, preferences, and discriminations, and are unduly and unjustly prejudicial to the rights of the complainant as a shipper of sugar over the lines of the defendants in competition with Arbuckle Brothers in the same markets.

We are told that the contention that a discrimination is being practiced against the complainant "could be forcibly urged
103 * * * if the refinery of the complainant had been located within the lighterage limits," and that the "trouble of the complainant springs from its location without the free lighterage limits." So far as the record gives us any light on the matter the complainant is not seeking to ship its refinery over the lines of these defendants; the whereabouts of the refinery is therefore wholly nonessential and of no possible concern to anyone. It is the sugar that the complainant is offering for shipment, and it is offered from a point that is within the lighterage limits. It may have been manufactured in the Philippines, or brought in from Porto Rico, or imported from Germany. This particular sugar happens to have been refined at Yonkers. But wherever it may have been made, the relevant fact from a transportation point of view is that at a given moment a quantity of sugar is at Pier 24 ready for shipment to interstate destinations on the lines of these defendants. It matters not how it got there, whether by lighter or by cart or by wheelbarrow;

it is ready for shipment at that point. At the same time a like quantity of sugar is ready at the Arbuckle Dock for shipment over the same lines and to compete in the same markets. Under every principle of equality embodied in this legislation the defendants must deal with the two shippers on exactly equal terms. They must themselves lighter the sugar to their regular freight stations across the river with their own equipment, or must accord to each shipper the privilege of doing the lightering in his own way; and if under section 15, or under any other provision of the act, they pay an allowance to one of the two shippers, on the theory that he has furnished a facility and performed a part of the transportation service for the
104 defendants, they must make a like allowance to the other shipper who has done precisely the same thing. To say that the defendants have made an agent of one shipper to do the lightering for it and have not established that relation with the other serves but to emphasize the discrimination, and seems neither to reach the equity and common justice of the situation, nor to constitute even a superficial compliance with the equality of privilege, service, and rate that the law requires of carriers in their contact with interstate shippers.

The sugar of the two competing shippers gets into the actual physical possession of the defendants on the Jersey shore under practically similar conditions, and if, as the defendants contend, the Arbuckle sugar commences to move at the Arbuckle Dock, it must be remembered that the defendants also contend that their transportation for the general public also extends to and commences at every other pier and dock within the lighterage limits that they have established. If, then, the defendants permit Arbuckle Brothers to furnish the lighterage facilities for their own sugar and perform the lighterage service across the river, and if this is to be regarded as a part of the transportation offered by the defendants under their tariffs, it is difficult to see upon what theory the defendants may defend their refusal to recognize the lighters hired by the complainant as its facilities in performing for the defendants a similar part of the transportation service. It seems to us very clear that the payment of allowances to one of these competing shippers, for a service of transportation alleged to be performed by them for the defendants with their own facilities, creates a present actual and substantial inequality that is unlawful under the act, when similar allow-
105 ances are refused to the other and competing shipper for an exactly similar service. The suggestion that if the Arbuckle Dock should now be purchased or rented and operated by the defendants, and if the defendants should use their own lighters in moving the Arbuckle sugar across the river, the disadvantage under which the complainant rests would not be removed, does not meet the conditions that actually exist and which, in our judgment, present an actual present undue discrimination in the relations of the defendants with the two shippers. The Arbuckle sugar moves either from the Jersey side or the New York side of the river. If its transportation

commences at the New York side, as the defendants contend, then it appears that Arbuckle Brothers, besides being paid for using their own dock as a receiving station for their own sugar, are also accorded the privilege of providing the lighters and performing a part of the transportation service on the sugar, namely, from the dock to the regular receiving stations of the defendants west of the river; it also appears that they are well and amply paid for this service and the use of their facilities. The complainant, on the other hand, does precisely the same thing from another dock within the lighterage limits and is refused any compensation at all. That is the actual situation before us as revealed upon the record. And it is that situation with which we must deal. We shall not undertake at this time to consider what rate question or other problem might be presented if the defendants should buy or lease and operate the Jay Street Terminal for themselves and perform the lighterage to and from that terminal with their own equipment and with their own employees. If
106 the present allowances paid to Arbuckle Brothers are a fair measure of what it would really cost the defendants to put the Arbuckle sugar on the Jersey side with their own equipment, the question might arise as to the reasonableness, from the standpoint of these competing refineries, of having identical rates on sugar from both sides of the river. But no such question is before us at this time.

On the whole record we hold that when the complainant, as hereinbefore described, tenders its sugar to the defendants on lighters at their regular receiving stations on the Jersey shore it must be received and carried thence to destination on rates, terms, and conditions that are no less favorable to the complainant in any particular than the rates, terms, and conditions governing and surrounding the sugar traffic of Arbuckle Brothers brought by them on floats and lighters to the same stations for carriage to the same destination.

The complainant also charges that a similar allowance paid to the owners of the so-called Brooklyn Eastern District Terminal, owned by Havemeyer interests, also subjects it to undue prejudice and disadvantage. It is at this dock that the output of the American Sugar Refining Company is largely handled. But, although our understanding had been to the contrary, we were told at the hearing that the Havemeyers owned only an insignificant amount of the capital stock of that company. Accepting these statements at their face value, we need not at this time consider that phase of the complaint. Nor, in view of our conclusions herein, is it necessary to consider the petition for a rehearing of the former case under this title to which allusion has been made.

An order will be entered in conformity with these conclusions; and upon the filing of a detailed statement properly checked by the
107 defendants a further order will be entered allowing reparation to the complainant in accordance with the prayer of its petition.

KNAPP, Chairman, dissenting:

I do not perceive that the record in this case presents any different question from the one decided in the former case between the same parties, 17 I. C. C. Rep., 40. Indeed, in one aspect the facts now presented seem to me less favorable to complainant, since it appears in this proceeding, by the explicit avowal of its counsel during the oral argument, that the transfer of the Jay Street Terminal to the defendant carriers and its operation by them would result in no benefit to complainant. This being so, as must be assumed from the admission made, I do not see how the ownership and operation of that terminal by Arbuckle Brothers constitutes undue preference to them or undue prejudice to complainant. I therefore dissent upon the general grounds set forth in the majority report in the former case.

PROUTY, Commissioner, also dissenting:

I do not agree to the disposition made of this case, and while the opinion of the Commission in the original case, Federal Sugar Refining Co. v. B. & O. R. R. Co., 17 I. C. C. Rep., 40, gives a correct and perhaps sufficient account of the question presented, I wish to add a word in view of the claim that this record presents a new state of facts.

So far as disclosed there are three sugar refineries in New York and vicinity, namely the Federal Sugar Refining Company, the complainant, whose factory is located at Yonkers, N. Y., and Arbuckle Brothers and the American Sugar Refining Company, the
108 factories of the two latter being located in Brooklyn, N. Y.
the complainant contends that the defendants by their rates discriminate against it in favor of its two competitors.

Yonkers, where the factory of the complainant is located, is without the free lighterage limits of New York, while the plants of Arbuckle Brothers and the American Sugar Refining Company are both situated within those limits. The original complaint alleged that Yonkers should also be included within these lighterage limits, and the discrimination alleged in that complaint was the failure of the defendants to so extend their lighterage service.

Upon a full presentation of the matter the Commission held that the New York lighterage limits ought not to be extended to include Yonkers, and that the defendants were within their lawful rights in declining to embrace the factory of the complainant within those limits. This must be kept continually in mind.

It is equally important to have ever in view the full significance of that holding. From all points within the lighterage limits the New York rate of the defendants applies, but that rate does not apply from points without those limits unless the point is located upon the line of some one of the defendants. Under this rule, the propriety of which is unquestioned, the American Sugar Refining Company and Arbuckle Brothers are entitled to have their sugar lightered free at the New York rate to the rail termini of the defendants in Jersey City and Hoboken.

The plant of the complainant at Yonkers is upon the tracks of the New York Central system, and its product for all points reached through that system and its connections can be loaded from the
109 storehouse into the car, but there are many points which can not be satisfactorily reached by this route, and for which the complainant finds it necessary to make use of the lines of the defendants; and in that event the sugar of the complainants must be transported by lighter from the plant at Yonkers to the rail termini at Jersey City in the same way that the sugar of its competitors must be lightered from their plants to Jersey City, but inasmuch as its plant is without the free lighterage limits the complainant is put to the expense of that lighter service.

Arbuckle Brothers and the American Sugar Refining Company have therefore a transportation advantage over the complainant with respect to their sugar shipped by the defendant lines through Jersey City, which arises out of the location of their plants and which this Commission has held and still holds is legitimate. The Federal Sugar Refining Company has, doubtless, from its location at Yonkers, certain advantages over its rivals. Its factory may have cost it less; its rents may be less; it may find labor conditions more favorable. It has immediate access to the rails of one of the great railroad systems of this continent, and for all points upon that system or its connections its product can be transferred from the warehouse to the car. But to offset these advantages it labors under the transportation disadvantage of being compelled to lighter its own product to Jersey City, while the product of its rivals is carried free.

It is repeated through page after page of the majority opinion that the complainant is at a transportation disadvantage in comparison with its competitor, Arbuckle Brothers. Most certainly it is, and this Commission has held that this disadvantage is not improper.

Starting, then, with the proposition that with respect to all
110 sugar handled over the lines of the defendants through their rail terminals upon the west bank of the Hudson River, the complainant is properly at a disadvantage as compared with its competitors located in Brooklyn, it may be asked, What further disadvantage against the complainant does the record in this case disclose? If any, it arises out of the following situation:

Arbuckle Brothers own an extensive dock in Brooklyn and the floating equipment for lightering to and from that dock. An arrangement has been made by these defendants with Arbuckle Brothers under the terms of which traffic of all kinds is handled over this dock to and from the rail termini of the defendants at Jersey City. The dock is known as the Jay Street Terminal of these defendants. Arbuckle Brothers are the agents of the various defendants in the operation of that terminal. As compensation for the lightering of this traffic and the transaction of the terminal business connected with receiving and delivering the same, Arbuckle Brothers are paid a fixed sum per 100 pounds, which is 3 cents where the traffic is in-

tended for certain destinations and 4½ cents for certain other destinations.

With respect to this contract certain facts should be noted.

It applies to all traffic of all kinds, both in and out, originating at or intended for that part of Brooklyn. As I remember the testimony about one-third of the outbound traffic consists of the product of Arbuckle Brothers, the other two-thirds being miscellaneous business. A much less per cent of inbound business is for Arbuckle Brothers.

When outbound traffic is presented for shipment over the line of one of the defendants a bill of lading is issued in the name of that defendant. This is, of course, signed by an employee of Ar-
111 buckle Brothers for the railroad company, but it is in all respects the act of the company and binding upon it. If, for example, a consignment of sugar were to be offered for shipment by Arbuckle Brothers over the line of one of these defendants, and if that sugar were lost in transit from the dock to the Jersey shore, the railroad would be responsible to the consignee for the delivery of the property. Under the contract between Arbuckle Brothers and the railroad, the railroad would have a claim against Arbuckle Brothers for the amount of the loss, but, as between the shipper and the railroad, Arbuckle Brothers are unknown.

The price paid is by the hundred pounds, and depends not on the character of the traffic but on the destination, being 3 cents per 100 pounds in some instances and 4½ cents in others. It is in no sense an allowance to Arbuckle Brothers for the lighterage of their sugar, except as that sugar may constitute about one-third of the total outbound business handled through that terminal.

The case finds, and this is not disputed, that under the actual working of this contract Arbuckle Brothers do not receive an excessive return for the service performed.

Just how, then, does this contract violate the act to regulate commerce?

To permit a shipper to receive from a railroad compensation for any part of the service of transportation undertaken by the railroad is a fruitful source of favoritism and discrimination. This has always been recognized by all students of the subject, and Congress, in view of this fact, might very well have prohibited all transactions of this kind. Had it done so the mere fact that Arbuckle Brothers are the owners of a substantial part of the traffic moving through this terminal would render the operation of the contract unlawful.

112 Congress has not done this. The Commission in calling attention of Congress to the wrongs which grew out of this connection between the shipper and the railroad, itself stated that there might be instances in which it was for the interest of the general public that some portion of the transportation service should be performed by the owner of the property, and that for this reason the better way seemed to be to make sure that the compensation paid the

shipper for the performance of this service was not extravagant. Whether influenced by this suggestion or not, Congress did, in the Hepburn amendment of 1906, provide that where the shipper rendered a part of the transportation service the Commission might inquire what would be a reasonable compensation for that service and fix a limit which should not be exceeded by the carrier, thereby expressly recognizing the right of the carrier to employ the shipper about the transportation of his own property, provided the compensation paid for that service was not unreasonable.

This very instance before us furnishes a good illustration of the necessity for this provision. Dockage property in Brooklyn is extremely valuable, and it might be both difficult and expensive for these various defendants to create proper freight terminals in that locality. This dock with its floating equipment was available. It gave to the public facilities much needed, and it enabled the defendants to provide those facilities on favorable terms to themselves. There is no apparent reason why these defendants should not be allowed to select this economical and efficient method of affording adequate public facilities for receiving and delivering freight in this locality, unless some wrong is done to some member of the shipping public.

113 While, however, it seems plain to me that Congress has not prohibited arrangements of this kind when no element of wrong is involved, I do not think that such a situation is lawful if it creates an undue discrimination in favor of the party who handles the business and receives the compensation, even though the compensation be not excessive. There is, therefore, the further question of fact, Does the operation of this contract give to Arbuckle Brothers an advantage over the Federal Sugar Refining Company? If it does, in my opinion it should be prohibited; if it does not, then in the interest of the public and of these defendants it should be sanctioned.

It is said that Arbuckle Brothers get free transportation for their sugar from this dock to Jersey City, while the complainant is obliged to lighter its sugar at its own expense. This certainly is true, but for the reason that the factory of Arbuckle Brothers is within the lighterage limits while that of the complainant is without—a situation which this Commission has approved.

It is suggested that Arbuckle Brothers are large shippers, while the complainant is a small shipper. The record does not show the relative shipments of these two refineries; nor did I suppose that this was material. It has been my understanding that under this act which we administer great shippers and small shippers stand exactly alike. I had not supposed hitherto that if a great shipper happened to be located within the free lighterage limits of New York his greatness was a reason for depriving him of the benefit of free lighterage.

It is said that Arbuckle Brothers handle their own sugar. But how does this benefit Arbuckle Brothers, provided the sum which they receive for that service is no more than a reasonable one?

It is urged that the compensation paid is more than is rea-
114 sonable. It is quite possible that the amount received per 100
pounds for handling this sugar is more than would be just if nothing but the Arbuckle sugar was handled through the Jay Street Terminal, but the contract for the operation of that terminal applies to the entire traffic, of which the Arbuckle sugar is but a fraction. That traffic is of all kinds and the expense of handling some kinds much exceeds that of others. What Arbuckle Brothers gain on sugar is lost on other kinds of business, provided the entire result is not too favorable. If the defendants have a legal right to make this arrangement we must, in passing upon it, consider it as a whole, and not select a particular item of traffic in inquiring whether the price paid for the service is too high.

Several things conclusively show that the trouble of the complainant springs from its location without the free lighterage limits, and not from the circumstance that the Jay Street Terminal is operated by Arbuckle Brothers.

Counsel for the complainant deliberately stated upon the argument that his client would be in no respect benefited if the operation of that terminal were to pass into the hands of a third party or were to be taken over by the defendants themselves. If, then, the complainant is not damaged by the arrangement as it exists, why should we interfere with that arrangement which appears to be for the common benefit of the public and of the railways?

The situation of the American Sugar Refining Company is equally in point. Most of the raw sugar which is refined is received or may be received by water, and much of the product may be sent out by water. A sugar refinery is almost of necessity accessible to extensive dockage facilities, and this is true in case of the American Company.
These docks were owned and operated by Havemeyer, the presi-
115 dent of that company, and the complainant made the same
claim upon the hearing with respect to the Sugar Trust that it made with respect to Arbuckle Brothers, upon the theory that Havemeyer was the principal owner of the American Sugar Refining Company. It turned out in evidence that the stock holdings of Mr. Havemeyer in that company were insignificant, and his connection with the company has since been entirely severed, so that to-day there is no community of ownership between the person operating the terminal through which its sugar is handled and the refining company itself.

It was practically conceded by the complainant, and is perfectly evident without any concession that the American Sugar Refining Company enjoys, under the present arrangement, precisely the same advantage over the complainant as do Arbuckle Brothers, and it is further evident that both companies would enjoy this advantage were Arbuckle Brothers compelled to retire from the operation of the Jay Street Terminal.

It may be suggested in this connection that the Sugar Trust would not be likely to sit idly by if the arrangement at the Jay Street

Terminal worked a discrimination against it in favor of its most active rival.

Since the promulgation of the opinion of the Commission in the original case a new feature has been introduced into this situation, to which perhaps some reference should be made.

Originally the complainant lightered its sugar from its factory at Yonkers to the rail termini of the defendants at Jersey City by the steamer "Ben Franklin." The various packages were marked by the complainant and put on board the steamer at Yonkers. The skipper was provided with bills of lading or receipts for signature by the various railroads over which the shipments were to
116 pass, and he transported these packages from Yonkers to Jersey City, made delivery to the various railroads, and obtained his receipts, which were returned to the complainant.

At the present time the packages are marked and loaded upon the "Ben Franklin" at Yonkers, precisely as before; but the cargo is now consigned to the complainant at Pier 24, which is on the New York side of the Hudson River and within the lighterage limits. The steamer proceeds to Pier 24 and ties up, whereupon a representative of the complainant steps on board, gives the captain of the "Ben Franklin" a receipt for his cargo, and delivers to him the blank receipts or bills of lading which were formerly put into his possession at Yonkers. After this has been done the steamer proceeds to Jersey City and makes delivery to the various rail lines.

It is claimed by the complainant, and apparently found by the Commission, that this amounts to a transportation of this sugar from Pier 24 to Jersey City.

The transaction, in fact, is precisely the same now that it was formerly, except that the steamer now stops at Pier 24. Great stress is laid in the opinion upon the fact that the "Ben Franklin" is actually made fast to the wharf, but to my own mind it would subserve exactly the same purpose if she were to whistle in midstream when passing that pier. It is impossible for me to understand how any performance of this character can change the actual relation of these parties when the thing accomplished is in both cases identical.

If the complainant saw fit to put its sugar onto Pier 24 and to notify the defendant to come there and receive it, a different question might be presented. Their traffic would then be within the
117 free lighterage limits, and it is possible that, having selected docks adjacent to the refineries of the competitors of this complainant, the defendants could not refuse to take the sugar upon this dock.

In order to avoid all misapprehension, let me repeat that we ought not, in my opinion, to sanction the arrangement for the operation of the Jay Street Terminal if that results in discrimination against this complainant. It is evident that this situation might take various forms, where it could be forcibly urged that such discrimination existed. If, for example, the refinery of this complainant had been located within the lighterage limits and the defendants, by select-

ing for their terminals in Brooklyn docks adjacent to the refineries of its two competitors, had compelled this complainant as a practical matter to lighter its product to the Jersey shore, either because that could be done more cheaply than to deliver it at the Brooklyn terminals or because those terminals were operated by its competitors, who, by handling the traffic of the complainant, would acquire an improper knowledge of its business, serious questions would be presented; but there is nothing of the kind in this case. The only disadvantage here which has been pointed out or which can be pointed out arises from the location of the complainant without the lighterage limits. That was its complaint in the original case, and that is the gravamen of its complaint here. Since the Commission has decided that the free lighterage limits of New York ought not to be extended so as to include Yonkers, and since it appears that the arrangement at the Jay Street Terminal is in the general public interest, I do not think this Commission should make any order which will prevent these defendants from continuing that arrangement.

118 *Order.*

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 5th day of December, A. D. 1910.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

FEDERAL SUGAR REFINING COMPANY
v.
THE BALTIMORE & OHIO RAILROAD COMPANY; THE Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and the Pennsylvania Railroad Company. } No. 2888.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof, and having found that the allowances paid by the above-named defendants to Arbuckle Brothers on their sugar brought
119 by them on floats from lighters to the regular terminals of defendants on the Jersey shore in the State of New Jersey, while at the same time paying no such allowances to complainant on its

sugar brought by it on lighters to the defendants' said regular terminals on the Jersey shore, unduly discriminate against said complaints and unduly prefer said Arbuckle Brothers in violation of the act to regulate commerce:

It is ordered, that the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain, from paying such allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowances to said complainant on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled report and order of the Commission are true copies of the originals now on file in the office of this Commission.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the Commission, this 6th day of March, 1911.

[SEAL.] A. MOSELEY, *Secretary.*

120 And afterwards, to wit, on the 13th day of April, 1911, a certain notice issued out of the clerk's office of said court, addressed to the Honorable George W. Wickersham as Attorney General of the United States, which said notice, and the marshal's return of service thereof, are in the words and figures following, to wit:

Notice to the Attorney General.

121 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY; THE Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario and Western Railway Company; and The Pennsylvania Railroad Company, petitioners,

vs.

UNITED STATES, RESPONDENT.

} No. 38.

The President of the United States to Honorable George W. Wickersham as Attorney General of the United States:

You are hereby notified that a petition has been filed in the above-entitled case in the office of the clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served by filing said copy in the Department of Justice.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, presiding judge of the United States Commerce Court, this 13th day of April, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk.*

Original of above notice and copy of petition served upon Honorable George W. Wickersham, Attorney General of the United States, this thirteenth day of April, A. D. 1911. (Accepted by Blackburn Esterline.)

F. J. STAREK, *Marshal.*

122 And on the same day, to wit, the 13th day of April, 1911, a certain notice issued out of the clerk's office of said court, addressed to Edward A. Moseley as secretary of the Interstate Commerce Commission, which said notice and the marshal's return of service thereof are in the words and figures following, to wit:

Notice to the secretary of the Interstate Commerce Commission.

123 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY; THE Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario and Western Railway Company; and The Pennsylvania Railroad Company, petitioners,

vs.

UNITED STATES, RESPONDENT.

No. 38.

The President of the United States to Edward A. Moseley as Secretary of the Interstate Commerce Commission:

You are hereby notified that a petition has been filed in the above-entitled case in the office of the clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served by filing said copy in the office of the secretary of the Interstate Commerce Commission.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, presiding judge of the United States Commerce Court, this 13th day of April, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk.*

Original of above notice and copy of petition served upon Edward A. Moseley, secretary of the Interstate Commerce Commission, this thirteenth day of April, A. D. 1911. (Accepted by W. H. Connolly.)

F. J. STAREK, *Marshal.*

124 And afterwards, to wit, on the 19th day of April, 1911, there was filed in the clerk's office of said court, in said entitled cause, a certain petition of intervention on behalf of the Federal Sugar Refining Company, in the words and figures following, to wit:

Intervening petition of Federal Sugar Refining Company.

125 In the Commerce Court of the United States.

BALTIMORE & OHIO RAILROAD COMPANY; CENTRAL Railroad Company of New Jersey; Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and Pennsylvania Railroad Company, petitioners, *vs.* UNITED STATES, RESPONDENT.	Term, 1911, No. 38.

Petition of Federal Sugar Refining Company to be made a party defendant.

To the honorable the judges of the Commerce Court of the United States:

The petition of the Federal Sugar Refining Company respectfully shows to this court as follows:

First. That petitioner is a corporation organized and existing under the laws of the State of New York, having its principal office at No. 138 Front Street, New York City.

Second. That the above-entitled suit involves the validity of an order heretofore made by the Interstate Commerce Commission in a proceeding wherein this petitioner was the complainant and the above-named petitioners were the defendants, and the interest of the petitioner therein.

Third. That petitioner desires to appear in and be made a party defendant to the case and to be represented before the courts by its proper counsel.

Wherefore your petitioner respectfully prays that it be made a party defendant to the case and that leave be granted to it to appear and be represented therein by its proper counsel.

ERNEST A. BIGELOW,
Solicitor for petitioner, #15 William Street, New York, N. Y.

Dated, New York, April 17th, 1911.

126 SOUTHERN DISTRICT OF NEW YORK, *County of New York, ss:*

C. A. Spreckels, being duly sworn, deposes and says that he is the president of Federal Sugar Refining Company, a corporation organized under the laws of the State of New York and the petitioner herein; that he has read the foregoing petition and knows the contents thereof: that the statements therein contained are true according to the best of his knowledge and belief.

C. A. SPRECKELS.

Subscribed and sworn to before me this 18th day of April, 1911.

[SEAL.] GEO. H. MITCHELL,
Notary Public, Westchester County,
(Certificate filed in New York County.)

127 And on the same day, to wit, the 19th day of April, 1911, there was filed and entered in the clerk's office of said court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order granting Federal Sugar Refining Company leave to intervene.

128 In the Commerce Court of the United States.

BALTIMORE & OHIO RAILROAD COMPANY, CENTRAL Railroad Company of New Jersey, Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, New York, Ontario & Western Railway Company, and Pennsylvania Railroad Company, petitioners,
v.
UNITED STATES, respondent.
} No. 38.

In the matter of the petition of Federal Sugar Refining Company.

Now, on this 19th day of April, 1911, this cause came on to be heard on the petition of Federal Sugar Refining Company to be made a party defendant in this suit and for other relief, said petition being verified the 18th day of April, 1911.

Whereupon, after reading said petition, and due deliberation being had thereon, on motion of Ernest A. Bigelow, solicitor for said Federal Sugar Refining Company, it is hereby

Ordered that the petitioner, Federal Sugar Refining Company, be and it hereby is made a party defendant in this suit, with leave to appear and be represented therein by its proper counsel.

Allowed per curiam.

KNAPP, *P. J.*

[Seal of the
United States
Commerce Court.]

129 And afterwards, to wit, on the 8th day of May, 1911, there was filed in the clerk's office of said court a certain appearance, in the words and figures following, to wit:

Appearance of P. J. Farrell, Esq.

130 In the United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY ET AL., petitioners, *v.* UNITED STATES, respondent.	No. 38. In Equity.

Appearance.

To Mr. G. F. Snyder, Clerk of said Court:

I hereby enter herein the appearance of the Interstate Commerce Commission as a party respondent and of myself as its solicitor.

Dated May 8, 1911.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, Respondent.

131 And afterwards, to wit, on the 10th day of May, 1911, there was filed in the clerk's office of said court by the petitioners in said entitled cause a certain notice of motion and accompanying affidavits, in the words and figures following, to wit:

Petitioners' notice of motion and affidavits.

132 In the Commerce Court of the United States.

Notice of motion and affidavit.

THE BALTIMORE AND OHIO RAILROAD COMPANY; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario and Western Railway Company; and The Pennsylvania Railroad Company, petitioners, *v.* UNITED STATES, respondent.	May session, 1911. No. 38.

Please take notice that, upon the petition herein, the affidavits hereto attached, the proceedings had, and testimony taken in a certain

proceeding before the Interstate Commerce Commission, wherein the Federal Sugar Refining Company was complainant and the petitioners herein were defendants, docket No. 2888, a motion will be
133 made herein on the 17th day of May, 1911, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, at the court room of this court, in the city of Washington, D. C., for an order restraining and suspending, until the final hearing and determination of this action, a certain order of the Interstate Commerce Commission, dated December 5, 1910, made in the said proceeding before the Interstate Commerce Commission, docket No. 2888, and for such other and further relief as to this court shall seem proper.

Dated May 9th, 1911.

HUGH L. BOND,
JACKSON E. REYNOLDS,
W. S. JENNEY,
GEORGE F. BROWNELL,
J. F. SCHAPERKOTTER,
JOHN B. KERR,
GEORGE STUART PATTERSON,
Solicitors for Petitioners.

TO THE INTERSTATE COMMERCE COMMISSION.
To the Hon. GEORGE W. WICKERSHAM,
Attorney General of the United States.

134 In the Commerce Court of the United States.

THE BALTIMORE & OHIO RAILROAD COMPANY et al., petitioners, *v.* UNITED STATES, RESPONDENT.	Term, 1911. No.

Geo. F. Randolph, E. M. Snyder, B. D. Caldwell, D. W. Cooke, T. W. Jarvis, J. C. Anderson, Geo. D. Dixon, being duly sworn, each for himself deposes and says that he is an officer of one of the petitioners hereinabove stated.

Inasmuch as the city of New York, and more particularly the borough of Brooklyn, is separated from the rail lines of the petitioners herein, used for transportation of freight, by the waters of New York Harbor, it is necessary for them, in order to receive and deliver freight in said borough of Brooklyn, to lighter the
135 same between the borough of Brooklyn and their rail terminals on the western shore of New York Harbor, on lighters, car floats, or barges owned and operated by them or for them under contractual arrangements.

The handling of this traffic requires the petitioners to have facilities along the water front of the borough of Brooklyn, where the boats used may lie and receive or deliver freight handled for the public other than the limited number who have private wharf facili-

ties. The impracticability of access with wagons to cars on floats makes it necessary to have at some points track space accessible to wagons on the upland adjacent to the wharf facilities, where cars may be placed for loading and unloading of carload shipments by the shipper or consignee, to or from wagons, particularly for commodities shipped in bulk. This in turn requires the use of locomotives for moving cars to and from floats and placing the cars. In order to receive and deliver less than carload freight for the general public such water-front facilities must include sufficient space and the necessary facilities for receiving and caring for such shipments while held. Fully equipped public terminal stations at convenient locations are thus required and are now maintained.

The water front which is most accessible to a large and important manufacturing and shipping section of the borough of Brooklyn lies between the United States Brooklyn Navy Yard and the Brooklyn Bridge. The wharf and dock facilities of such water frontage are fully occupied and in use for private or public purposes, and by reason of the enormous amount of water-borne commerce in the port of New York are very valuable. By reason of its accessibility to such valuable dock facilities, its central location in the city of
136 New York and borough of Brooklyn, and the fact that it is built up with costly structures, the property adjacent to such wharf facilities is also very valuable.

The Jay Street Terminal has established and developed a modern terminal station in the center of that portion of the water front of the borough of Brooklyn above described. At such terminal there are the necessary facilities for the receipt and shipment of freight both in carloads and less than carloads, and for loading and unloading freight to and from cars on tracks from and to wagons. The petitioners in this proceeding, as well as other common carriers, which are not parties hereto, have entered into contracts with said Jay Street Terminal in order to receive the benefits of the use of such terminal facilities for shippers and receivers of freight over their respective lines. Such contracts made by your petitioners are more particularly described and set forth in the petition in this proceeding. As it is more convenient, expeditious, and economical for the freight received and delivered at such terminal to be lightered from and to the rail termini of the petitioners by the lighters, floats, or barges of the Jay Street Terminal rather than by the separate lighters, floats, and barges of the petitioners, the said contracts cover and include the performance of such lighterage service by the Jay Street Terminal.

Such an arrangement is the only practicable means of furnishing the required terminal facilities for that section of the borough of Brooklyn, because of the limited extent of the water front facilities and the necessity for their use for other public and private purposes, the high value thereof, and of the land adjacent thereto. It is of great benefit and convenience to that section of the borough of

Brooklyn, which is conveniently accessible to the Jay Street
137 Terminal, to have available at a single point the services of
all the carriers which make use of the facilities of such terminal. The public is thus saved large expense and great inconvenience in trucking shipments to more distant separate or joint terminals, and also gets the benefit of various routes, and of the mose desirable route, via one line or another, to substantially all points from or to which the public in the territory accessible to the terminal may desire to ship.

The petitioners will suffer and sustain irreparable damage if they are required to give up the valuable use of the facilities of the Jay Street Terminal, in that they will be unable to procure similar facilities elsewhere which will answer the same purpose, and the public shippers and receivers of freight, to whom the Jay Street Terminal is most convenient and accessible, will likewise suffer and sustain irreparable damage through the necessity of being obliged to use other and less accessible and convenient facilities for the shipment and receipt of their freight at a large increased expense. The petitioners will also suffer and sustain irreparable damage if they cease to pay the Jay Street Terminal the compensation provided for in the contracts above referred to, on account of sugar shipped by Arbuckle Bros. through the said Jay Street Terminal, in that the petitioners will thereby violate the aforesaid contracts and thus subject themselves to action for damages for such failure as well as to the termination of such contracts, and the loss of the use of the facilities covered thereby. If, as a condition of the continuance of payments to the Jay Street Terminal on account of Arbuckle Bros.' sugar as aforesaid, and of the continuance of the present arrangement with the Jay Street Terminal, the petitioners pay the Federal Sugar
Refining Company for lighterage of its sugar to the petitioners'
138 terminal on the west shore of New York Harbor, the peti-
tioners will suffer and sustain irreparable damage in that they will be unable to recover from the Federal Sugar Refining Company the amount so paid in the event of a final decree herein in favor of petitioners.

Geo. F. Randolph.
E. M. Snyder.
B. D. Caldwell.
D. W. Cooke.
T. W. Jarvis.
J. C. Anderson.
Geo. D. Dixon.

Sworn to and subscribed before me this 12th day of April, 1911.

[NOTARIAL SEAL.] C. L. Malcolm,
Notary Public.

Notary Public, Kings Co., #202. Register's office, Kings Co., #4495. Certificate filed in N. Y. Co. #3208.

139 In the Commerce Court of the United States.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.
vs.
UNITED STATES.

STATE OF NEW YORK,
City of New York, County of Kings, ss:

William A. Jamison, being duly sworn, says:

The Jay Street Terminal is a copartnership composed of John Arbuckle and myself. We have duly filed the proper certificate under the laws of the State of New York and are authorized to do business under that name. The Jay Street Terminal owns, occupies, and operates a public railroad terminal in the Borough of Brooklyn, city of New York, bordering and extending along the East River about 541 feet and from the bulkhead line to John Street. The depth of the upland on the easterly end is 412 feet 6 inches and at the westerly end 217 feet 6 inches. To make this terminal possible, the city of New York in 1905 closed Bridge Street between John Street and the East River, and this was done upon the petition of mer-
140 chants and manufacturers of Brooklyn, among them the largest department stores in the borough, principal storage warehouses and manufacturers with very large tonnage output. Among the petitioners were the following: Kirkman & Son, Frederick Loeser & Co., Anderson & Co., Mack Bros., Pioneer Warehouses, Geo. H. Shephard, F. Bischoff, F. W. Dayton & Son, B. G. Latimer & Sons Co., Journay & Burnham, Cowperthwait & Co., Thompson Bonney Co., American Antiformin Co., Maxwell & Co., Empire Cork Co., Robert Gair Company, Jones Bros., Lamson Mch. Works, Hanan & Son, National Licorice Co., Andrew J. Wikander, Kings County Manufacturing Co., The Horando Tuller Brewing Co., Kent Machine Works, Leavy & Britton Co., The Tin Plate Decorating Co., The Sterling Piano Co., Brooklyn Furniture Co., Browning, King & Co., R. A.
141 Becker, Bellevue Chemical Co., M. J. Shevlin, Schwartz & Co., A. C. Elemere, jr., Chapman & Co., A. D. Matthews' Sons, Michael Bros., Ernst Zobel, John McCormick, Burns & Holley, Smith, Gray & Co., E. W. Bliss Co., Grand Union Tea Co., John W. Masury & Son, Boorum Place Co., S. Steinman & Co., Thomas Fleming, Steam Boiler Equipment Co., Thos. D. Carpenter, Edwin C. Burt Co., F. W. Devoe & C. T. Reynolds Co.

In the petition signed by these companies and copartnerships is the following statement:

"Jay Street Terminal has constructed and is now operating a terminal railroad on their premises on the south side of Bridge Street and the East River. This location, by reason of the short haul, easy street grades, via Gold, Bridge, Jay, and Pearl Streets, and the comparative freedom of these streets from congestion incident to street car operation is admirably suited for giving us the improvements in terminal facilities which we so much need."

The manufacturers and merchants who joined in the peti-
142 tion of the Jay Street Terminal are located in the central portion of Brooklyn, bounded by the navy yard, Broadway, Fulton Street, and the East River. The petition to close Bridge Street, looking to the extended operation of Jay Street Terminal, was also approved by the Downtown Taxpayers Association, representing the second ward of the Borough of Brooklyn, and its officers appeared before the public authorities of the city of New York in support of the application and represented the great benefit to this portion of Brooklyn to follow the extension of the operations of the Jay Street Terminal. Bridge Street was finally closed by the board of estimate and apportionment of the city of New York April 14, 1905.

The Jay Street Terminal is the agent of all the railroad companies parties to this proceeding under contracts set forth in the papers herein. The railroad yard is between Bridge and Gold Streets and, including trackage of floats berthed alongside piers, will accommodate at one time 235 freight cars. The tracks extend also from Bridge to Jay Street. There is one float bridge at which car floats tie up, and cars are moved between the float and the terminal tracks. There are three piers. The land and buildings devoted to the purposes of the terminal are assessed for 1911 for taxation at $1,757,300.00.

The equipment comprises one large freight-house, 2 Baldwin steam locomotives, 3 tugboats, 2 steam lighters, 10 barges, and 6 floats.

The shipping territory served by the Jay Street Terminal may roughly be bounded by the navy yard, Broadway, Fulton Street, and the East River. The only other freight terminal within these limits is a relatively small and unimportant terminal of the New
143 York Dock Company, at or near the foot of Fulton Street, which occupies a plot near to Fulton Ferry 117 feet 3/4 inches in length and 112 feet in depth. The capacity of the Fulton Terminal is not to exceed twenty cars. The next nearest terminal of the New York Dock Company is near the foot of Atlantic Avenue. On the other side of the Jay Street Terminal the nearest terminal is at the Wallabout Basin. At this point the Delaware, Lackawanna & Western Railroad has a float bridge and terminal tracks accommodating 100 cars. Proceeding northward and eastward along the East River, the next terminal is that of the Eastern District Terminal. The Jay Street Terminal is the most convenient and accessible to the territory above described bounded by Broadway, Fulton Street, and the East River. One great advantage to shippers at the union terminal of the Jay Street Terminal is that the shipper can in one truck load deliver freight for all of the represented lines and in one trip a truck can carry freight from all of the included lines. The Jay Street Terminal receives it at its freight station and distributes it among cars of different railroads represented.

When the Jay Street Terminal was established it was practically impossible for the railroad companies to acquire and establish a terminal accessible to the shipping territory above described in any other way than by contract with the owners of the Jay Street Terminal property.

Beginning at the New York Navy Yard the property between Little Street and Hudson Avenue is owned by the Brooklyn Union Gas Company and is held for the purposes of that company. At this point the bulkhead line and pier line are practically identical.

144 From Hudson Avenue to Gold Street the water-front is owned by the Atlantic White Lead Company. Immediately west of Gold Street is the power house of the Kings County Electric Light and Power Company, next to which and extending to Adams Street is the property of the Jay Street Terminal and of Arbuckle Bros. Adjoining Adams Street is the tower of the Manhattan Bridge belonging to the city of New York. The next block is between Washington and Main Streets, and the piers and water-front between Washington and Main Streets are so situated with relation to the Manhattan bridge pier and tower and the extent and length of this block make it useless for the purposes of a terminal. At the foot of Main Street is the Catherine Ferry, now in operation, and next to Main Street and extending to Dock Street and from Dock Street to the tower of the Brooklyn Bridge is property of the New York Dock Company.

To the west of Fulton Street the availability of the terminals of the New York Dock Company are limited by the topography of Brooklyn. Immediately back of the water front is Furman Street running east and west and immediately back of Furman Street is a high bluff, so that trucks desiring to reach any point on the water-front substantially between Atlantic Avenue and Fulton Street must make the journey via Fulton Street or Atlantic Avenue. This long haul to the New York Dock Company terminal makes the Jay Street Terminal of great advantage to shippers and receivers of freight within the territory above described naturally tributary to Jay Street Terminal.

East-bound freight is delivered to Jay Street Terminal as follows:

145 Railroad cars of the several companies are switched by the railroad companies to and upon the car floats of the Jay Street Terminal at the termini of the railroads in New Jersey. Representatives of the railroad deliver to the master of the float the freight bill containing a description of the freight, the name of the consignee, and the weight and the charges for the freight. The car floats are then towed by a tugboat belonging to the Jay Street Terminal to the terminal in Brooklyn. Cars containing carload freight are here switched upon special tracks called team tracks. Less than carload freight is taken to warehouses and unloaded from the cars upon platforms. The Jay Street Terminal now prepares (from the data shown in the Railroad Company's freight bill) its own printed triplicate form consisting of an arrival notice, freight bill, and delivery receipt, as per sample attached. When the freight reaches Jay Street Terminal the arrival notice is sent to the consignee, who calls and presents it as documentary evidence of title, and it is so accepted. He then pays the freight, if it has not been prepaid, and obtains his goods and

the receipted freight bill, after signing the delivery receipt. In comparatively few cases eastbound freight is received on negotiable bill of lading, in which cases the terminal requires the surrender of the bill of lading as well as of the arrival notice. Once a week the terminal accounts to the railroad companies for freight moneys collected, and monthly the terminal renders a balance sheet showing the status of the account accompanied by an unpaid bill report of any items that cover freight not delivered.

146 West-bound freight is handled by the Jay Street Terminal as follows:

The terminal furnishes to the shippers who are doing business with it blank bills of lading of the so-called standard form approved by the Interstate Commerce Commission June 27, 1908, and consisting of (1) a straight (or order) bill of lading, which is sent to the consignee, (2) a memorandum copy thereof, acknowledging that an original bill of lading has been issued, which is held by the shipper, and (3) a shipping order, which is retained by the carrier. These bills of lading are stamped with the name Jay Street Terminal to show that the freight originated in Brooklyn and at the Jay Street Terminal. The bills are there and then signed by Mr. Frederick Tillier, as agent of the railroad company. The bills are signed under the contract with the Railroad Company. Copies of the bill of lading, the shipping order and the memorandum acknowledgment are annexed. The shipping order is copied in detail upon manifest and the two are delivered to the Railroad Company by the master of the float having the freight. These manifests are made from the shipping order in duplicate, the duplicate is receipted by the Railroad Company and returned to the Jay Street Terminal. Whenever the freight is prepaid it is collected by the Jay Street Terminal and accounted for to the Railroad Company substantially as above described. This description of the receipt and handling of west bound freight covers shipments by Arbuckle Bros. of sugar, and these are made exactly like shipments by shippers of general merchandise.

147 A transaction in sugar, including the sale by Arbuckle Bros., delivery to the Jay Street Terminal and the shipment from the Railroad Company may be described, as follows:

A broker in sugar or any buyer signs and delivers to Arbuckle Bros., at their office in the borough of Manhattan, written order for a given number of barrels of sugar signed by the purchaser or his broker which contains the name of the purchaser, his address, and the character of the route over which the sugar is to be shipped, via all rail, lake-and-rail, ocean-and-rail, etc. On the face of this and in red letters is the following inscription: "Delivery complete on receipt of goods by carrier." From the office of Arbuckle Bros., in Manhattan, to the refinery in Brooklyn, a shipping slip is sent, which gives the name of the consignee, the shipment route, and the description of the sugar, the price, and the freight rate. It also contains

the freight rate which the consignee agrees to pay. This freight rate which the consignee agrees to pay may be the full freight rate charged by the railroad company which carries it or may be less, and for the following reasons: Sugar shipped from New York is sold, generally speaking, at the Philadelphia rate, and Arbuckle Bros. absorb the difference between the full freight rate from New York and the Philadelphia rate, so that the rate written upon these orders is, generally speaking, the Philadelphia freight rate. This is the result of competition between New York and Philadelphia refineries in territory served by both. New Orleans also competes with New York, and from time to time the freight rate is the New Orleans rail rate, and Arbuckle Bros. pay the difference between that rate and the New York rate.

148 The sugar is delivered by Arbuckle Bros. from their refinery to the Jay Street Terminal in trucks. The sugar is loaded from the trucks into the railroad cars. Arbuckle Bros., as shipper, fill out and sign, as shipper, a blank bill of lading, which has been delivered to said Arbuckle Brothers, as shipper, by the Jay Street Terminal, and deliver said bill of lading to Jay Street Terminal along with sugar to be shipped. The terminal signs the bills of lading in the name of the railroad as hereinabove described and delivers the original and the memorandum acknowledgment to the consignor. The shipping order is retained by the Jay Street Terminal and sent to the Railroad Company with the freight bill. At the same time the Railroad Compay issues to the Jay Street Terminal a freight bill showing the amount of freight to be collected from Arbuckle Bros. on account of this shipment. The Railroad Company charges the Jay Street Terminal with this amount. On the receipt of the freight the Jay Street Terminal delivers to Arbuckle Bros. a freight bill showing goods shipped, the route, and the freight charged. These bills are delivered to Arbuckle Bros. daily, and once a week Arbuckle Bros. settle with the Jay Street Terminal and the Jay Street Terminal with the Railroad Company. The same weekly credit is extended to every regular shipper from the Jay Street Terminal. The bill of lading covering the sugar when it is delivered to Arbuckle Bros. contains the name of the purchaser as the consignee, and this is true of eighty-five per centum of the shipments of sugar. About fifteen per cent of sugar shipped by Arbuckle Bros., is shipped to Arbuckle Bros., as consignee at different points in the United States. The bills of lading
149 received by Arbuckle Bros., are the same day, and never later than the next day, sent by mail to the consignee with an invoice. The result of these transactions as they are understood between the buyers of sugar and Arbuckle Bros., is that the title to all sugar sold by Arbuckle Bros., changes to the buyer when the bill of lading is signed at Jay Street Terminal.

The refinery of Arbuckle Bros. is situated between Jay and Adams Streets. On the easterly side of Jay Street is the coffee mill of Ar-

buckle Bros. Next to the coffee mill is the Frost Bros. coal yard, owned and operated also by Arbuckle Bros., and next the property owned and operated by the Jay Street Terminal. All the sugar of Arbuckle Bros. is carried from the refinery to the terminal in trucks and is handled in exactly the same manner as shipments of other shippers received at the terminal.

The total tonnage handled by Jay Street Terminal east and west bound for the year 1910 was 613,305 tons. The sugar shipped by Arbuckle Bros. constituted 44 per cent of the total tonnage handled, which was the largest percentage of the whole tonnage since the terminal started. The number of shipments made by Arbuckle Bros. during 1910 was 22,894, and the number received was 1,826; total, 24,810.

The number of the shipments made by other shippers was 250,480, and the number received by consignees other than Arbuckle Brothers was 40,009; total, 290,489.

The number of shippers and receivers other than Arbuckle Bros. who delivered and received freight to and from the Jay Street Terminal was at least 500.

150 Hereunto annexed is a directory of about 200 Jay Street Terminal shippers of importance, giving their names and addresses.

William A. Jamison.

Sworn to and subscribed before me this 9th day of May, A. D. 1911.

[seal.] A. M. Harned,
Notary Public, No. 137, Kings County, N. Y.
(Certificate filed in New York County.)

151 *Directory of Jay Street Terminal.*

AGENTS.

Baltimore & Ohio R. R.
Central R. R. of New Jersey.
Delaware, Lackawanna & Western R. R.
Erie R. R.
Lehigh Valley R. R.
New Jersey & New York R. R.
New York, Susquehanna & Western R. R.
New York Central & Hudson River R. R.
New York, Ontario & Western R. R.
Pennsylvania R. R.
West Shore R. R.
Central Hudson Steamboat Co.
Central Vermont Line:
  Canada-Atlantic Transit Co.
  National Despatch.

Clyde S. S. Co.:
- Brunswick Line.
- Charleston-Jacksonville Line.
- Philadelphia Line.
- Wilmington-Georgetown Line.

Hartford & N. Y. Transp. Co.:
- Bridgeport Mcht's Line.
- Hartford Boat.
- Joy Line.
- Maine Steamship Co.

Hudson Navigation Co.:
- Citizens' Line.
- Murray's Line.
- Peoples' Line.

Manhattan Navigation Co.

Metropolitan S. S. Co.

New England Navigation Co.:
- Bridgeport Line.
- Fall River Line.
- New Bedford Line.
- New Haven Line.
- Norwich Line.
- Providence Line.

New York & Baltimore Transportation Co.

Norwich Propeller.

Ocean S. S. Co.:
- Atlantic Coast-Savannah Line.
- Central-Savannah Line.
- Seaboard-Savannah Line.

Old Dominion S. S. Co.:
- Atlantic Coast Line.
- Cumberland Gap Despatch.
- Kanawha Dispatch.
- Norfolk & Southern R. R.
- Norfolk & Western Dispatch.
- Piedmont Air Line.
- Seaboard Air Line.
- Virginia, Tenn. & Georgia Air Line.

Rutland Transit Co.

Southern Pacific Co.-Atlantic Steamship Lines.

Texas City S. S. Co.

Terminal docks and warehouses: Foot of Bridge Street, Brooklyn.

Traffic department: 71 Water Street, New York.

F. Tillier, superintendent, Brooklyn; J. L. Carling, general agent, New York.

152 *Directory of receivers and shippers in Brooklyn, N. Y., whose freight can be handled to advantage through Jay Street Terminal.*

A.

Abraham & Straus, 420 Fulton St.
Acton, Jno., 118 John St.
Adelphi Silver Co., 67 Prospect St.
Adler Color & Chem. Works, 170 Tillary St.
Albert & Baker Co., { 331 Classon Ave. / Consignees preference. }
Albertype Co., 250 Adams St.
Alford, F. A., 1007 Atlantic Ave.
American Can Co., 93 Adams St.
Amer. Safety Razor Co., Jay & Johnson Sts.
Anheuser Busch B. Co., 435 Atlantic Ave.
Ansonia Clock Company, Seventh Ave.
Arbuckle Bros., foot of Jay St.
Armstrong Cork Co., 216 Plymouth St.
Atlantic Supply Co., 500 Atlantic Ave.
Averill Paint Co., 240 Plymouth St.

B.

Bainbridge's Sons, C. T., 2 Cumberland St.
Balch, Price & Co., 376 Fulton St.
Barett Mfg. Co., 131 Navy St.
Behr, H. & Co., 33 Tiffany Place.
Bellevue Chem. Co., 359 Jay St.
Bennett, Theo. & Son, 382 5th Ave.
Bischoff, F., 32 St. Felix St.
Bliss, E. W. & Co., Plymouth & Adams Sts.
153 Boorum & Pease Co., 80 Bridge St.
Braunworth & Co., 16 Nassau St.
Brill, Edw. E., 302 Pearl St.
Brooklyn Daily Eagle, Johnson & Washington Sts.
Brooklyn Furn. Co., Fulton St. & DeKalb Ave.
Brooklyn Navy Yard, Navy St.
Brooklyn Post Office, Washington & Johnson Sts.
Brooklyn Union Gas Co., 180 Remsen St.
Byron, E. C., 323 Flatbush Ave.
Burt Co., E. C., 59 Jay St.

C.

Cameron, Moch Co., 49 Washington St.
Campbell, Jas., 108 Prospect St.
Central Knitting Co., 772 Madison St.
Chandler-Ebel Music Co., 222 Livingston St.
Chivers Bookbinding Co., 911 Atlantic Ave.
Clarke, J. F., 228 Concord St.
Conrad, W. B. & Co., 61 Poplar St.

Cooke & Cobb, 213 Steuben St.
Courter, Wm., c/o E. H. Barnes.
Cowperthwait Co., Flatbush Ave. & Fulton St.
Cro. Hy. & Gardner, 55 Orange St.
Curtin, W. H. Mfg. Co., 331 Adams St.
Cuthbert, R. Lee, 6 Prospect St.

D.

Dayton & Montgomery, 63 Flatbush Ave.
DeHaven Mfg. Co., 52 Columbia Hts.
Devoe, F. W., and C. T. Raynolds Co., Smith St. & Hamilton Ave.
Dixie Cotton Felt Fibre Co., Pearl & Prospect Sts.
Dodd, Joseph M., Jay & York Sts.
Donnelly, J. R. Co., 54 Classon Ave.
Dressner Bros., 183 Fulton St.
Durst, Wm., 4 Water St.

154 E.

Eckhardt & Blauth, 73 Raymond St.
Economy Elec. Co., 217 Fulton St.
Edison Elec. Illum. Co., 360 Pearl St.

F.

Foster Pump Wks., 36 Bridge St.
Friedlander, J. B. Co., 233 Washington St.
Fulton, Fdy. & Mch. Co., 21 Furman St.

G.

Gair, Robt., Co., Washington & Water Sts.
Gardner, Lucas Co., 54 Columbia Hts.
Gasan Spring & Bed Co., 28 Cumberland St.
Graef's, H. A., Son, 58 Court St.
Grand Union Tea Co., Pearl & Water Sts.
Griffin, White Shoe Co., 124 Pearl St.

H.

Halche, Robt., 47 Fulton St.
Hanan & Son, Bridge and Front Sts.
Hasbrouck, J. L. & Co., 234 Duffield St.
Herman Chemical Co., Jay & Willoughby Sts.
Hibbard, W. H., Mfg. Co., 79 Washington St.
Hilton Co., Smith, Jay & Fulton St.
Hoole Mach. & Eng. Wks., 29 Prospect St.
Howard & Fuller B. Co., Bridge & Plymouth Sts.
Hydrox Chemical Co., 18 Fulton St.

I.

Improved Mailing Case Co., 30 Main St.
Ingersoll, O. W., 243 Plymouth St.
International Cork Co., 1707 Sutton St.

J.

Jacobson, A. C., & Sons, 81 Bridge St.
Jonas & Levinson, 602 Myrtle Ave.
155 Jones Bros. Co., 68 Jay St.
Jones Decorative Glass Co., Hudson Ave.

K.

Keenan, C. W., Fulton & Jay Sts.
Kent Mch. Wks., 39 Gold St.
Kenyon, C. Co., 754 Pacific St.
Kirkman & Son, Bridge St.
Knight, T. G. Co., 52 Myrtle Ave.
Kohnstamm & Co., H., Columbia St.
Krantz, H. Mfg. Co., 160 7th St.
Kreoge, S. S., Fulton St.
Kronheimer & Oldenbush, 366 Butler St.
Kurscheedt, E. B., Apron Co., 30 Main St.
Kurtz & Son, J., 169 Smith St.

L.

Latimer, B. G. & Son, Fulton & Flatbush Ave.
Latteman, J. J. Shoe Mfg. Co., St. Edwards St.
Leavy & Britton, 87 Jay St.
Levy, A. & Co., 250 Hudson Ave.
Liebmans & Sons Brewing Co., 33 Forest St.
L. I. Furn. Co., 46 Myrtle Ave.
Lockitt's, Geo. Sons, 212 Fulton St.
Lock Seal Ferrule Co., 256 Plymouth St.
Loeser, Fredk. & Co., Fulton & Bond Sts.

M.

Mack Bros. Motor Car Co., Atlantic & 3rd Aves.
Mallenckrodt Chemical Works, 37 Jay St.
Malt-Diastase Co., 64 Garden St.
Marguerite Mfg. Co., 383 Pine St.
Marresford, Wm. F., 56 Pearl St.
Mason, Au & Magenheimer, 22 Henry St.
Mason, I., 115 Myrtle Ave.

Masury, Jno. W. & Son, 75 Jay St.
156 Matchless Mfg. Co., 31 Washington St.
Matthews, A. D. & Son, Fulton & Gallatin Sts.
McEnery, J., 86 Myrtle Ave.
McNeill, R. S. Co., Jay & Water Sts.
Meade Shoe Co., 102 Myrtle Ave.
Metal Package Co., 30 Main St.
Metzge, C. H., 12 Clinton St.
Michaels Bros., 442 5th Ave.
Michaels, Jos., 184 Smith St.
Miller & Hyams, Smith & State Sts.
Modern Paper Box Co., Tillary & Washington Sts.
Moehle Litho. Co., Clarendon Road.
Moore & Co., Benj., 231 Front St.
Muller & Van Winkle, 22 Bridge St.
Mullins, John & Son, 84 Myrtle Ave.
Munshein, S., Carlton & Flushing Aves.
Myers, Wm. H., 62 Fulton St.

N.

Nachmann, I., 17 Fulton St.
Namm & Son, A. I., Fulton & Hoyt St.
National Casket Co., Pearl St. & Myrtle Ave.
National Lead Co., Front & Gold Sts.
National Lead Co., Marshall & Gold Sts.
National Licorice Co., 106 John St.
National Parlor Suit Co., 65 Raymond St.
Newman, T. A. & L. F., 305 Fulton St.
N. Y. Sand & Facing Co., 106 Grand Ave.
Nutting, A. J. & Co., Smith & Fulton Sts.

O.

O'Neill, Wm., 249 Myrtle Ave.
Ormonde Mfg. Co., 406 Hudson Ave.

P.

Pearson's, Alex. Sons, 59 Myrtle Ave.
157 Perkins, J. T., Co., Kent Ave.
Phillips, Doup & Co., 60 Pearl St.
Pittsburg Plate Glass Co., Hudson Ave. & Fulton St.
Prahar, L. B., 124 Pearl St.
Peterson, F., 44 Boerum Pl.
Pfeiffer, I., Plymouth & Bridge Sts.
Planet Mills Mfg. Co., 335 Carroll St.
Planten, H., & Son, 93 Henry St.

Pool's, Geo., Son, 70 Fulton St.
Purvis & Shelton, 241 Plymouth St.

R.

Reid, J. W. & W. H., 21 Willoughby St.
Republic-Dodge Mfg. Co., Pearl & Prospect Sts.
Rich, W. H., & Son, 768 Pacific St.
Riker Drug Co., 264 Fulton St.
Robertson, Jno., & Co., 246 Water St.
Rohman, Sons & Co., C. F., 343 Adams St.
Ronalds & Johnson Co., 50 Boerum Pl.
Roosen, H. D., Co., 263 Water St.
Ruwe Bros., 765 Atlantic Ave.
Ruxton, Phillip, 251 Water St.

S.

Salant & Salant, Knickerbocker Ave.
Sanitary Metal Tile Co., 137 Duffield St.
Schaeffer & Budenberg Mfg. Co., 481 DeKalb Ave.
Schmidt, M. J., 48 Smith St.
Scollay, Jno. A., 74 Myrtle Ave.
Shoyer, D. W., Co., 30 Main St.
Slattery, J. B., & Bro., 135 Johnson St.
Smith, D. H., 256 Plymouth St.
Smith & Son, Thos., 410 Third Ave.
Spalding, A. G., & Bro., 660 Pacific St.
Squibb, E. R., & Sons, 36 Doughty St.
158 Staines, Bunn & Taber So., 147 Lawrence St.
Standard Veneer Bbl. Co., 62 Water St.
Sternan, S., 195 Plymouth St.
Stransky & Co., 30 Main St.
Strohbeck, Chas., 309 Johnson St.
Sweeney, W. H., Mfg. Co., 30 Main St.

T.

Taylor & Co., 47-49 Rockwell Pl.
Thomson Meter Co., 100 Bridge St.
Thompson & Norris Co., Prince & Concord Sts.
Thompson, Bonney Co., 124 Atlantic Ave.; 45 York St.
Tiemann, F. M., 88 Fulton St.
Tin Plate Decorating Co., 176 Front St.
Tisch, Chas., 93 Rockwell Pl.
Tompkins & Tuthill, 15 Fulton St.
Torres, Jose, 46 Bowne St.

Towns & James, 174 Fulton St.
Turner Construction Co., 37 Hewes St.

U.

Union Lead & Oil Co., 81 Front St.
United Lead Co., 81 Front St.
United States Electro Galv. Co., 1 Park Ave.
Unitype Co., 150 Sands St.

W.

Washington Mfg. Co., 99 Myrtle Ave.
Watch Tower, T. & B. Soc., 13 Hicks St.
Webster, E. G., & Son, 622 Atlantic Ave.
Wesel, F., Mfg. Co., 70 Cranberry St.
West Envelope Co., 91 Orange St.
Whalen Bros., 168 Smith St.
Williams, J. H. W., & Co., 150 Hamilton Ave.
Woolworth, F. W., & Co., 532 Fulton St.

159 Z.

Zeises, L., 101 Bridge St.
Zerega's, A., Sons, 55 Front St.

JAY STREET TERMINAL.

At this modern and centrally located terminal fronting on the East River, Brooklyn, N. Y., all classes of merchandise—any quantity, will be received and delivered, excepting the following prohibited articles: Acid, explosives, matches, household goods less than carloads, fresh meats, petroleum and petroleum products (see note), bonded freight, and "to-be-graded" grain.

NOTE.—Shipments of texene (turpentine substitute) in carloads, may be accepted for delivery at this terminal.

Unexcelled trackage facilities insure the prompt handling of cars to and from floats, and the loading and delivering of freight to or from cars placed on team tracks.

Less than carload shipments are received and loaded under cover direct to cars, and unloaded from cars direct to delivery platforms in this terminal's freight house.

Delivery and loading tracks are easy of access, and all driveways are paved and without grade.

Single pieces not exceeding 20 tons may be accepted for this terminal; a gantry crane of 20-tons capacity, for the handling
160 of heavy machinery and other heavy and bulky freight, having been installed for that purpose.

Bills of lading and shipping receipts should bear notation "Jay Street Terminal Delivery," to insure that delivery, and card way-bills covering shipments of a bulky nature or of sufficient weight to warrant the use of straight cars should read direct to Jay Street Terminal, and thereby avoid delay in transferring or consolidating freight.

Superior facilities are available on the premises for the storage of general merchandise, and cartage arrangements can also be made at reasonable rates.

173 And afterwards, to wit, on the 11th day of May, 1911, there was filed in the clerk's office of said court, in said entitled cause, a certain notice and petition for leave to intervene and for an injunction, on behalf of the Brooklyn Eastern District Terminal, in the words and figures following, to wit:

Notice and intervening petition of Brooklyn Eastern District Terminal.

174 In the Commerce Court of the United States.

THE BALTIMORE AND OHIO RAILROAD Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and The Pennsylvania Railroad Company, petitioners,
against
UNITED STATES, RESPONDENT.

May session, 1911. No. 38.

Notice is hereby given that a petition by the Brooklyn Eastern District Terminal, of which the annexed is a copy, for leave to intervene as one of the complainants in this suit, has been filed with the court; and that at a session of the court to be held in the city of
Washington, D. C., on the 17th day of May, 1911, at the
175 opening of court on that day, or as soon thereafter as counsel
can be heard, application will be made to the court for the relief in said petition prayed, and for such other and further relief as may be just.

Dated New York, May 10th, 1911.

PARSONS, CLOSSON & MCILVAINE,
Solicitors for Brooklyn Eastern District Terminal, Petitioner, 52 William Street, New York City, N. Y.

To the HONORABLE ATTORNEY GENERAL OF THE UNITED STATES
(And all other parties of record or in interest).

176 In the Commerce Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY; The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and The Pennsylvania Railroad Company, petitioners,

against

UNITED STATES, RESPONDENT.

Term 1911. No. 38.

To the Judges of the Commerce Court of the United States:

The Brooklyn Eastern District Terminal, a corporation of the State of New York, brings this its petition for leave to intervene as one of the complainants in this suit; and thereupon your petitioner respectfully shows unto your honors as follows:

1. Your petitioner is a transportation corporation organized under the laws of the State of New York, engaged as a common carrier in the transportation of property partly by railroad and
177 partly by water, the transportation by water being performed by your petitioner under arrangements, hereinafter stated in detail, with the railroads who are complainants in this suit, for a continuous carriage or shipment, from one State to another.

2. This is a suit instituted in this court on or about the 11th day of April, 1911, by the seven complainants herein, who are railroads, commonly known as "trunk lines," engaged in the transportation of passengers and property between the city of New York and the Western States and the intermediate territory, to set aside and suspend an order of the Interstate Commerce Commission made on the 5th day of December, 1910, in a proceeding before it, wherein the Federal Sugar Refining Company of Yonkers was complainant, and the complainants herein were defendants, requiring the complainants herein to desist and abstain from paying to Arbuckle Brothers (operating what is known as the Jay Street Terminal) certain so-called allowances for floatage, lighterage, and terminal service rendered by them to the complainants in connection with sugar transported by them in New York Harbor to and for the complainants, while at the same time paying no such allowances to the said Federal Sugar Refining Company on its sugar. Application has been made to this court by the complainants herein that a temporary injunction issue suspending the said order and any and all proceedings thereunder pending a final determination of the suit; and, as your petitioner is informed and believes, the said application is to be heard by this court on the 17th day of May, 1911.

3. Your petitioner was a party in interest, though not of record, to the proceeding before the Interstate Commerce Commission in which the said order was made; and there is involved in this
178 suit the validity of such order and the interest of your petitioner; and your petitioner is a corporation interested in the said controversy before the Interstate Commerce Commission and in this suit, brought by the complainants, under the terms of the act to regulate commerce, relating to the said action of the Interstate Commerce Commission.

4. Your petitioner is the Brooklyn Eastern District Terminal, which is mentioned in the original petition of the Federal Sugar Refining Company to the Commission, annexed to the petition of the complainants herein as Exhibit B, and in the answer thereto of the defendants, annexed to said petition as Exhibit C, and in the report of the Commission and in the separate opinions of certain of the Commissioners, thereto appended, upon said original petition (likewise annexed to the complainants' petition herein as Exhibit D), and in the report of the Commission and in the separate opinions of certain of the Commissioners, thereto appended, upon the petition which resulted in the order now sought to be set aside (likewise annexed to the complainants' petition herein as Exhibit G). In such last-named report your petitioner is referred to in the following passage thereof (p. 106):

"The complainant [the Federal Sugar Refining Company] also charges that a similar allowance paid to the owners of the so-called Brooklyn Eastern District Terminal, owned by Havemeyer interests, also subjects it to undue prejudice and disadvantage. It is at this dock that the output of the American Sugar Refining Company is largely handled. But although our understanding had been to the contrary, we were told at the hearing that the Havemeyers owned only an insignificant amount of the capital stock of that com-
179 pany. Accepting these statements at their face value, we need not at this time consider that phase of the complaint."

5. All of the capital stock of your petitioner is owned by the partnership of Havemeyers & Elder, composed of the following persons, to wit, Louisine W. Havemeyer, Horace Havemeyer, Theodore A. Havemeyer, Henry O. Havemeyer, jr., and Frederick C. Havemeyer, jr. Neither the said partnership, nor any of its members, owns or has any interest, direct or indirect, in the American Sugar Refining Company, referred to in the said report of the Commission, or in its stock, or any connection therewith, nor has had since the 1st day of January, 1911.

6. For years past your petitioner, as lessee of the said firm of Havemeyers & Elder, has maintained and operated in the borough of Brooklyn, New York, along the East River, between North Third and North Tenth Streets, an extensive railroad terminal, which has been designated in the tariffs of the complainants' railroad herein, except the Pennsylvania Railroad, and is used by it and three other railroads, and eighteen steamship lines, engaged in the transportation

EXHIBITS NOT SUITABLE FOR MICRO-FILMING

of freight to and from New York Harbor, as a receiving and delivery station for their freight. Its equipment is correctly described in the existing tariff of the complainant, the Central Railroad of New Jersey (I. C. C. S. No. 2230) as follows:

"Brooklyn Eastern District Terminal (formerly Palmer's Dock).

"At this station, which faces on the East River and extends from North Fourth Street to North Tenth Street, Brooklyn, N. Y., freight of all descriptions in any quantity, both package and bulk, can be handled, except acids, in carboys, less than carloads; petroleum oils, in tank cars, powder, high explosives, ice, in any quantity;
180 'to be graded grain' and twelve wheel railroad cars on their own wheels.

"There are trackage facilities where cars can be handled to and from floats and contents forwarded or delivered from track; lumber, brick, etc., in full carloads, or heavy packages or pieces sufficient to warrant straight cars may be accepted for and ticketed direct to this station. This station has also covered pier where package freight is handled directly between the cars and pier. The terminals at Brooklyn Eastern District Terminal are centrally located and easy of access, and are equipped with modern appliances for the convenient and prompt handling of freight of all kinds. The yards for the delivery of track freight have paved roadways without grade and a capacity for several hundred cars. There is also a yard for the accommodation of livestock, grain elevators of 500,000 bushels capacity, a hay warehouse in which hay can be inspected, sold, or stored, one crane of 20 tons capacity, and 2 cranes of 10 tons capacity each, and other special facilities for the handling of heavy freight, such as machinery, structural material, &c."

The present value, as nearly as can be estimated, of the plant and equipment of your petitioner's Brooklyn terminal alone is as follows:

Real estate	\$5, 288, 360. 00
Building and construction	435, 869. 53
4 tugs	137, 146. 70
13 floats	258, 987. 98
13 lighters	79, 377. 72
9 locomotives	49, 659. 66
Franchises	14, 000. 00
	6, 263, 401. 59

181 Upon this investment of \$6,263,401.59 the net earnings of your petitioner during the year 1910 were \$321,555.12, or 5.13 per cent. All of these earnings (except an amount not to exceed 5.02% thereof, from other sources, such as storage, drayage, etc.) were derived from the payments made to it by the complainants and other connecting carriers, besides charges for dunnage, car service, and shifting of 4½ cents, or 3 cents for each 100 pounds of freight transported by it between its terminal and the termini of such railroads and steamship lines in New York Harbor; the said sum of 4½ cents being paid it on all freight moving to or from the western termini of the trunk lines and points beyond, except grain in bulk,

coal, and coke, and the said sum of 3 cents per 100 pounds on all other freight except coal and coke. During the year 1910 the total freight transported by it to or from the said Brooklyn terminal and smaller terminal stations likewise maintained by it at Pidgeon Street in Long Island City and at Warren Street in Jersey City, was 2,796,263,006 pounds. Of this total, 868,022,125 pounds, to wit, 31.04 per cent, was sugar and 1,928,240,811 pounds, to wit, 68.96 per cent, was miscellaneous merchandise. Of this total tonnage transported by your petitioner, 53.74 per cent was east bound and 46.26 per cent west bound. It was received from or delivered to not less than 1,650 separate customers. The maintenance and operation of the terminal is a commercial necessity for the large and busy districts of Brooklyn and Jersey City which it serves, and is rendered possible only by the fact that as a union terminal for all the said railroads and steamship lines it is able to amalgamate their east bound and west bound business, so that it handles each way approximately the same amount of traffic, as above stated, and is thus enabled to earn the very moderate return of 5.13 per cent upon its investment,
182 as above stated; a result which could not be accomplished by any terminal handling the traffic of one railroad or steamship line alone.

7. The transportation business of your petitioner, as above outlined, is secured to it not alone by its ability to perform the service, but, in the case of most of the trunk lines, by contracts between it and them having yet several years to run, substantially in the form of that between your petitioner and the complainant Erie Railroad Company, a copy of which is annexed hereto, marked Exhibit A. In and by said contract your petitioner agrees to maintain its terminal and the necessary floats, tugs, docks, float bridges, and approaches; at all times to receive, transfer, and deliver freights loaded or to be loaded in cars sufficient to accommodate the amount of business to be interchanged by it with the railroad; to be absolutely and unqualifiedly responsible for the safety of all cars and freight while in its possession; to provide a competent person to superintend the traffic of the railroad, and to issue bills of lading for it upon its account for west-bound freights received for it by your petitioner at its terminal; to be responsible for and pay to the railroad company all freight moneys and charges for the transportation of east-bound freights, and all freight moneys and charges payable in advance on west-bound freights, and to keep insured all freights, cars, or property received by it under the contract. In consideration thereof, the railroad company upon its part by the eleventh article of the contract agrees that within the limits of the former city of Williamsburg, extending from Wallabout Bay on the south, to Newtown Creek on the north, not inclusive of either, the railroad, unless legally compelled to do so, will not, during the continuance of the contract, establish or maintain any freight stations, nor within said
183 limits receive on barges, lighters, floats, or other water craft, for transportation over the lines of its railroad to west-

ern points therein mentioned, any freights, except as provided for in the said contract; and that it will not deliver on barges, lighters, floats, or other water craft at any points within such limits, unless legally compelled to do so, any freight received or transported eastwardly over its railroad in any other manner than as provided for in such contract. And by the fourteenth article thereof the railroad further agrees to pay to your petitioner in full for all its services under this contract, as well as full compensation for all responsibility to be undertaken by it in respect to cars and freight, as follows:

"(*a*) For all freight, except coal and coke, transported over the Erie Railroad which shall have been received from its connecting rail or water line west of the western termini of the trunk lines, on through rates, or for freight received by the Terminal Company at its aforesaid premises and destined for rail or water transportation by the railroad company to points west of said western termini, on through rates, excepting grain in bulk, at the rate of four and one-fifth ($4\frac{1}{5}$) cents per hundred pounds.

"(*b*) For freight originating at or destined to any of said western termini or points east thereof, or billed to or from said western termini at local rates, three (3) cents per hundred pounds.

"(*c*) For grain in bulk the rate shall be three (3) cents per hundred pounds."

8. The contracts between the different trunk lines, complainants herein, and the Jay Street Terminal (operated by Arbuckle Brothers) (annexed to complainants' petition as Exhibit A)
184 are substantially similar to the existing contracts above averred between the said trunk lines and your petitioner. For the reasons hereinafter averred, neither the said Jay Street Terminal, nor the terminals of your petitioner, can be maintained or operated unless the payment of the stipulated compensation of 3 and $4\frac{1}{5}$ cents per 100 pounds for the floatage, lighterage, and terminal service rendered thereunder shall continue to be made to them by the railroads.

9. The order of the Interstate Commerce Commission, which the complainant railroads must necessarily obey, unless it be set aside in this suit, requires them to desist from paying such compensation to the Jay Street Terminal in regard to sugar received through it from Arbuckle Brothers, unless they shall at the same time pay the same compensation in regard to sugar received from it to the Federal Sugar Refining Company; which is not a common carrier, and does not own or operate a terminal station for any of the railroads or steamship lines, or for any other shipper or consignee of freight, but is simply a shipper of its own product. If this order should go into force, its necessary effect, the only alternative provided being the discontinuance of a terminal the continued maintenance of which is necessary for public convenience and has been contracted for between its owners and the railroads, would be to compel the payment by the railroads to the Federal Sugar Refining Company of the same sums of $4\frac{1}{5}$ cents and 3 cents per 100 pounds of freight

transported, as is now paid by them to the Jay Street Terminal and to your petitioner for the floatage, lighterage, and terminal service afforded by them respectively.

10. The actual cost to the Federal Sugar Refining Company
185 of transporting its sugar from its refinery to the termini of
the railroads, as it maintains no terminal station, tracks, floats, lighters, tugs, or other real estate or equipment necessarily appertaining to a terminal, but procures the transportation to be performed for it by a lighterage company at what is the prevailing rate in the harbor of New York for lighterage alone, to wit, 3 cents per 100 pounds, is and will be such 3 cents per 100 pounds and no more; whereas under the terms of such order it will receive from the railroads on all sugar bound for points beyond the western termini $4\frac{1}{5}$ cents per 100 pounds. On all such sugar it will accordingly earn a profit, and in effect receive a rebate from the railroads, of $1\frac{1}{5}$ cents per 100 pounds, thus making the freight rate actually paid upon such sugar produced by it $1\frac{1}{5}$ cents per 100 pounds less than the published rates, and giving it that advantage over other competing sugar refineries located in the harbor of New York; among others, the American Sugar Refining Company, a large part of whose traffic is now, owing to the contiguity of its refineries to the terminal of your petitioner, handled by your petitioner.

11. In order to avoid the illegal discrimination which would thereby insue to the Federal Sugar Refining Company if such order shall go into effect, the railroads will of necessity be compelled to permit the other sugar refineries in the harbor of New York, among others, the said American Sugar Refining Company, instead of delivering their outgoing sugar to the different terminal stations, your petitioner's among the number, which are now maintained by the railroads in convenient proximity to the refineries, and at which such sugar is now loaded directly into the through cars upon
which it is to be transported to destination, to deliver it at
186 the railroad termini, there to be unloaded and again loaded
into such cars, by lighters hired by the refineries themselves at a cost to them of 3 cents per hundred pounds only; and to receive from the railroads upon all such sugar destined for points beyond the western termini $4\frac{1}{5}$ cents per hundred pounds; and in this manner to enable all of the said refineries, as well as the Federal Sugar Refining Company, though maintaining no terminal stations, to earn the same profit and receive the same rebate on such sugar of $1\frac{1}{5}$ cents per hundred pounds, and to make the freight rate payable upon such sugar less than the published rate by that amount.

12. Such diversion of traffic from the now established terminal stations of the railroads not only involves two unnecessary handlings of the merchandise so transported and a congestion of traffic at the termini of the different railroads, but a loss to each such terminal station, your petitioners among the number, of their present revenue of 3 and $4\frac{1}{5}$ cents per hundred pounds upon the traffic so diverted. Without such revenue it will not be possible for any of such terminals

to earn a reasonable return upon the investment involved in it, or to continue to maintain and operate it. The discontinuance of such terminal stations would necessarily involve great inconvenience and loss, not only to the railroads for whom freight is now received and delivered there, without transshipment to and from the through cars in which it is transported, but to the numerous neighboring shippers and consignees who now use such terminals for the receipt and delivery of their freight, and who, not having and not being able to procure water-front facilities such as are possessed by the few large refineries and other industries now on the water front, will be unable to avail themselves of the privilege of lightering their
187 own freight at a profit at the expense of the railroads, which the order of the Commission complained of in effect secures to such water-front industries alone.

13. The compensation of 4⅓ cents per 100 pounds on western traffic now paid by the railroads to the terminals is a reasonable and necessary compensation for the service performed by them. Such terminals are in effect union receiving and delivery yards, located at convenient points along the water front of New York Harbor, of the railroads for whose benefit they are maintained. They are necessarily union terminals, since individual terminals for the different railroads can not be profitably maintained or operated. They are necessary, since they afford a means whereby the freight shipped from or consigned to the district served by the terminal can be assembled at and delivered from a point conveniently near its origin or destination, and there loaded into or unloaded from the through cars in which its continuous carriage has been or is to be performed without transshipment or breaking bulk. If such terminal stations were not maintained by the terminal companies from the compensation paid to them by the railroads for the services performed by them, they would need to be maintained at the direct expense of the railroads themselves, and less economically than now; since it is only as union terminals, serving all the different railroads and steamship lines entering the harbor, that they can be made to earn a reasonable profit upon the capital necessarily invested in them. Each such terminal involves the devotion to its use of large areas of expensive real estate and the maintenance of the extensive equipment heretofore described, including locomotives, and tugs, and floats, each capable of receiving from the tracks from twelve to twenty
188 loaded freight cars, transporting them across the harbor, and thence delivering them upon the tracks of the terminal or of the railroads by which they are to be moved to destination. It appears from Exhibit G, attached to the complainant's petition hereto, that the capital necessarily invested in the Jay Street Terminal amounts to $1,200,000, and that its net earnings for one year were but $35,566.84, or approximately three per cent. As heretofore averred, the capital necessarily invested in its Brooklyn terminal alone by your petitioner amounts to $6,263,401.59, and its net earnings therefrom for one year were but $321,555.12, or approximately $5.13

per cent. Even such moderate returns upon the capital invested are made possible only by the compensation received from the railroads of $4\frac{1}{5}$ cents per 100 pounds on the western traffic; and for the service performed by such terminals, such compensation of $4\frac{1}{5}$ cents per 100 pounds is reasonable and necessary. On the other hand, lighterage service alone, as distinguished from a terminal and car floatage service, is performed by small lighters, representing each an investment of not more than $7,000, a fleet of from two to four of which can be towed by a tug hired for the purpose at an expense of $7.50 per hour. For such simple lighterage service, when not performed in connection with the maintenance of a terminal, the compensation of 3 cents per 100 pounds is adequate.

14. As your petitioner is advised and believes and therefore alleges, the order of the Interstate Commerce Commission sought to be set aside in this suit is illegal; for the following reasons, among others:

(*a*) The maintenance by the railroads of public receiving and delivery stations to which cars are transported on their own wheels, such as the Jay Street Terminal and that of your petitioner's,
189 located at points on Long Island convenient to the origin and destination of the freight to be carried, and the payment of the compensation necessary to procure the maintenance of such stations and the transportation of such cars to and from them, is a lawful and necessary service performed by the railroads. The Interstate Commerce Commission has not the power to require the railroads, as a condition of being permitted to maintain and operate such terminals, to pay lighterage allowances to individual shippers who elect instead to deliver their own freight to the railroad termini in New Jersey and on Staten Island. By the order in question the Commission has assumed to exercise such power.

(*b*) The maintenance of such public terminals for handling cars on their own wheels is not a like service to lightering the freight of individual shippers from their private docks to the railroad termini; and the railroads may pay to such terminals the expense of the public service, and refuse to pay to such shippers the expense of the private service, without thereby being guilty of any discrimination. The order in question of the Commission is based upon the proposition that the railroads in so doing are guilty of unjust discrimination.

(*c*) The railroads may under the law maintain public receiving and delivery stations, such as the Jay Street Terminal and that of your petitioner, at convenient points, without thereby incurring any obligation to pay shippers, located at points remote from such stations, the expense of the cartage or lighterage of their merchandise from their factories to any of such stations or to another station. The order of the Commission imposes upon the railroads such obligation, as a condition of being allowed to maintain such public stations.

190 (*d*) The railroads, having established through routes and joint rates to their several stations on Long Island, your petitioner's among the number, can not be required under the law to pay

to individual shippers on Long Island, who elect to deliver their freight instead at an intermediate point in such through route, the cost to such shippers of such delivery to such intermediate point. Under the order of the Commission the railroads will be required to make such payments.

(*e*) The just and reasonable charge and allowance for the sole service of lightering sugar, when the expense of maintaining a public terminal station is not involved in the service, from the refineries in New York Harbor, and from the Federal Sugar Refining Company in Yonkers, to the railroad termini in New Jersey and or Staten Island, and the actual cost to the refineries of such lightering, is three cents per 100 pounds. The order of the Commission requires the railroads to pay to such refineries on all sugars so lightered bound for points beyond the western termini, $4\frac{1}{2}$ cents per 100 pounds, to wit, a rebate of $1\frac{1}{2}$ cents per 100 pounds on all such sugar.

Wherefore your petitioner prays that it may be allowed to intervene as a complainant herein and to prosecute this suit, and that a final decree may be entered herein setting aside and annulling said order of the Interstate Commerce Commission dated the 5th day of December, 1910, and further that a temporary injunction may issue herein suspending said order and any and all proceedings thereunder pending a final determination of this proceeding.

And your petitioner will ever pray.

Dated, New York, May 9th, 1911.

PARSONS, CLOSSON & MCILVAINE,
Solicitors for Brooklyn Eastern District Terminal, Petitioner, 52 William Street, New York, N. Y.

191 STATE OF NEW YORK, *County of New York, ss:*

Henry O. Havemeyer, jr., being duly sworn, deposes and says: That he is the president and general manager of the Brooklyn Eastern District Terminal, the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof; and that the statements contained therein are true, according to the best of his knowledge and belief.

H. O. HAVEMEYER, JR.

Sworn to and subscribed before me this 10th day of May, 1911.

[SEAL.] ANDREW WOELFEL,
Notary Public, Richmond County.
(Cert. filed in N. Y. Co.)

EXHIBIT A.

This agreement, made this sixth day of May, A. D. one thousand nine hundred and seven, between the Brooklyn Eastern District Terminal, of the city of New York (hereinafter called the "Terminal Company"), party of the first part, and the Erie Railroad Com-

pany (hereinafter called the "Railroad Company"), party of the second part:

Whereas the Terminal Company is the lessee of certain premises situated in the city of New York, borough of Brooklyn, eastern district, fronting on the East River between North Fifth and North Sixth Streets, and extending back to within one hundred and fifty (150) feet of Berry Street, upon which are warehouses, main
192 tracks and sidings, float bridges and approaches, with other appurtenances suitable for the reception and delivery of freights, sugars, cooperage materials, etc., for carriage between said premises and the freight station of the Railroad Company at present located at Jersey City; and

Whereas the Terminal Company is also the lessee of certain premises situated in the said borough of Brooklyn, eastern district, fronting on the East River between North Ninth and North Tenth Streets, on which are hay warehouses, grain elevators, warehouses, main tracks and sidings, float bridges, and appurtenances suitable for the reception and delivery of freight as contemplated under this contract; and

Whereas the railroad of the Railroad Company runs to its said freight station at Jersey City, and the Railroad Company desires to avail itself of the facilities of the Terminal Company for the purpose of transferring its freight in both directions between said premises in Brooklyn and the freight station aforesaid:

Now this agreement witnesseth:

First. The Terminal Company will put and maintain in good order the premises aforesaid in the borough of Brooklyn for the reception and delivery of freights hereunder, and will provide and maintain floats, tugs, docks, float bridges, and approaches adequate at all times to receive, transfer, and deliver freights loaded or to be loaded in cars under this contract, and sufficient to accommodate the amount of business hereunder contemplated.

Second. The Terminal Company will receive at Jersey City float bridges of the railroad company in cars placed on its floats all freight intended for delivery at its premises aforesaid, and will safely
193 carry and deliver same as consigned, and as well will receive at its said premises and load into cars, under the rules of the Railroad Company, and safely carry and deliver the freights loaded upon its floats to the Railroad Company at Jersey City float bridges.

Third. The responsibility of the Terminal Company for eastwardly-bound cars and property therein shall begin when the same are properly loaded and secured upon its floats at said Jersey City float bridges of the Railroad Company and the floats released from said bridges, and shall continue in respect to cars until they have been returned by it loaded or empty, and in respect to the property contained in eastwardly-bound cars, its responsibility shall continue until its actual delivery and acceptance by consignee at Brooklyn.

Fourth. The responsibility of the Terminal Company of all property to be transported west-bound shall begin from the time the same is received from the consignor or consignors thereof, at its premises aforesaid, and shall continue until the same, loaded into cars, shall have been brought to the float bridges of the Railroad Company at Jersey City in readiness to be attached thereto.

Fifth. The said responsibility of the Terminal Company for the safety of all cars and freight shall be absolute and unqualified, without any exception or exemption whatever, without regard to the cause or occasion of the loss or damage, if any, and without regard to the degree of care or want of care exercised by the Terminal Company, and shall be enforceable by the Railroad Company, or others, as their interest shall appear, for the full amount of the loss or damage sustained.

194 Sixth. The Terminal Company will provide and keep at its own expense, upon its said premises, a competent person, to be satisfactory to the Railroad Company, to superintend the business hereunder contemplated and to carry out the directions of the Railroad Company as to loading cars, such person to have authority, subject to current instructions from the Railroad Company, to issue bills of lading of the Railroad Company for west-bound freights received upon said premises for transportation under this contract; provided, however, that the Terminal Company hereby assumes all risk of and becomes responsible, as hereinbefore provided, to the Railroad Company or others, as interest may appear, for all west-bound freight so received, until the same shall have been loaded into cars and delivered at the float bridges of the Railroad Company at Jersey City aforesaid.

Seventh. The Terminal Company will become responsible for and pay to the Railroad Company all freight moneys and charges as set forth in the freight bills rendered by the Railroad Company for the transportation of east-bound freights, and in like manner will be responsible for and pay to the Railroad Company all freight moneys and charges which may have been made payable in advance on west-bound freights, all of which payments shall be turned over to the Railroad Company in accordance with the latter's customary rule; and, if so required, a bond with surety satisfactory to the Railroad Company shall be furnished by the Terminal Company.

Eighth. The Terminal Company will insure and keep insured against loss or damage by fire and marine risks all freights, cars, or property received by it upon its floats or upon said premises
195 under this contract, so long as said freights, cars, or property shall remain in its possession and until delivered to consignees or to the Railroad Company for transportation as hereinbefore provided, including the time such freight, cars, or property shall be upon its lighterage line, and such insurance shall be for the benefit of the Railroad Company and others as their interest shall appear, and to an amount and in such manner as will be satisfactory to the Railroad Company.

Ninth. In cases of eastbound freight consigned to other stations of the Railroad Company in New York Harbor not billed "lighterage free," where destination is changed to the premises of the Terminal Company, the Terminal Company shall, at the request of the Railroad Company, collect from the consignee or forwarder the sum of three cents per hundred pounds, and pay the same over to the Railroad Company, which said three cents per hundred pounds shall be allowed and paid to the Terminal Company as full compensation for all services performed in such cases.

Tenth. Said Terminal Company will furnish said Railroad Company with a complete and accurate copy of each and all contracts made by it with other railroad companies during the term of this contract, and the Erie Railroad Company shall have and enjoy, during the life of this contract, all rights and privileges granted to any other railroad by said Terminal Company upon as favorable terms, with respect to allowances or otherwise, as granted to any other railroad company, anything herein to the contrary notwithstanding.

Eleventh. It is further understood and agreed that within the limits of the city of Williamsburgh, so called, extending from Wallabout Bay, on the south, to Newton Creek, on the north, not
196 inclusive of either, the said Railroad Company, unless legally compelled to do so, will not, during the continuance of this contract, establish or maintain any freight stations, nor within said limits receive on barges, lighters, floats, or other water craft, for transportation over the line of its railroad to western points hereinafter mentioned, any freights, except as provided for in this contract, and that it will not deliver on barges, lighters, floats, or other water craft at any points within the limits hereinbefore described, unless legally compelled to do so, any freight received or transported eastwardly over the railroad of the Railroad Company in any other manner than as provided for in this contract, and that in case of any breach of this provision the Terminal Company may recover from the said Railroad Company, and it shall pay to it at the rate of three (3) dollars for each carload, averaged at 20,000 lbs., received, delivered, or transported contrary to this provision, except that in the event of the disability of the Terminal Company through strikes, lockouts, fire, etc., not being able to handle the traffic of the Railroad Company promptly as offered, the Railroad Company shall have the privilege of making delivery of freight by barge or float within the limits above named during such disability of the Terminal Company.

Twelfth. The railroad company will maintain all necessary tracks, float bridges, and approaches at its said Jersey City station for the purpose of the business hereunder contemplated, and will take away from said float bridges in Jersey City in regular turn all the westbound freight intended for transportation over the railroad of the Railroad Company and its connections, and deliver to the floats
197 of the Terminal Company all the east-bound freight consigned to or intended for delivery at the terminal of the Terminal Company.

Thirteenth. The Railroad Company hereby agrees to provide sufficient cars at all times, unavoidable delays excepted, and to supply all railroad books, blanks, and stationery necessary for the purposes of the business to be carried on under this contract, and with all reasonable despatch to receive and take away from the freight station at Jersey City aforesaid all the west-bound freight intended for transportation over said Erie Railroad and its connections.

Fourteenth. The Railroad Company shall pay the Terminal Company in full for all its services under this contract, as well as full compensation for all responsibility to be undertaken by it in respect to cars and freight as follows:

(*a*) For all freight, except coal and coke, transported over the Erie Railroad which shall have been received from its connecting rail or water line west of the western termini of the trunk lines, on through rates, or for freight received by the Terminal Company at its aforesaid premises and destined for rail or water transportation by the Railroad Company to points west of said western termini, on through rates, excepting grain in bulk, at the rate of four and one-fifth ($4\frac{1}{5}$) cents per hundred pounds.

(*b*) For freight originating at or destined to any of said western termini or points east thereof, or billed to or from said western termini at local rates, three (3) cents per hundred pounds.

(*c*) For grain in bulk the rate shall be three (3) cents per hundred pounds; it being understood that no grain will be handled under this agreement except that intended for domestic consumption.

198 (*d*) It is understood that the western termini referred to above are as follows: Suspension Bridge, Black Rock, Buffalo Junction, Erie, Belleaire, Niagara Falls, Buffalo, Dunkirk, Pittsburgh, Wheeling, Tonawanda, East Buffalo, Salamanca, Allegheny, Parkersburg.

(*e*) For traffic rated per gross ton, either in the official classification or in commodity tariffs, the allowance to the Terminal Company thereon shall be three (3) cents or four and one-fifth ($4\frac{1}{5}$) cents per hundred pounds, as the case may be, regardless of the gross ton rating.

(*f*) If coal and coke are handled under this contract, the terms of and rates for such handling shall be fixed from time to time by special agreement.

(*g*) All settlements are to be made monthly.

Fifteenth. During the continuance of this contract on eastbound and westbound shipments the same rates of freight shall prevail to and from the premises of the Terminal Company that prevail to and from the regular freight stations of the Railroad Company in New York City.

Sixteenth. This contract shall continue in effect until December 1st, 1916, and thereafter shall terminate by ninety days' notice in writing given by the Terminal Company, or the Railroad Company, to the other of desire to terminate the same.

Seventeenth. This agreement shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns, respectively.

199 In witness whereof, the parties hereto have executed this contract in duplicate the day and year first above written.

BROOKLYN EASTERN DISTRICT TERMINAL,
By H. O. HAVEMEYER, JR., *President.*

Attest:
J. H. MCCAFFERTY, *Secretary.*
ERIE RAILROAD COMPANY,
By F. D. UNDERWOOD, *President.*
Attest:
DAVID BOSMAN, *Secretary.*

200 And on the same day, to wit, the 11th day of May, 1911, there was filed in the clerk's office of said court, in said entitled cause, a certain motion of the intervening respondents, Interstate Commerce Commission and Federal Sugar Refining Company, in the words and figures following, to wit:

Motion to dismiss.

201 In the United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY ET AL., petitioners, *v.* UNITED STATES, RESPONDENT.	In Equity. No. 38.

Motion to dismiss.

Come now the Interstate Commerce Commission and the Federal Sugar Refining Company, parties respondent in the above-entitled suit, by their respective solicitors, and move this honorable court to dismiss the petition of the above-named petitioners in said suit, and in support of said motion show:

That the allegations contained and the facts set forth in said petition do not constitute a cause of action or entitle said petitioners to the relief or any of the relief asked for by them in and by said petition.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
ERNEST A. BIGELOW,
Solicitor for Federal Sugar Refining Company.

202 And afterwards, to wit, on the 12th day of May, 1911, there was filed in the clerk's office of said court, in said entitled cause, a certain affidavit of service of the intervening petition of the

Brooklyn Eastern District Terminal, in the words and figures following, to wit:

Affidavit of service.

203 In the Commerce Court of the United States.

BALTIMORE AND OHIO RAILROAD COMPANY et al., petitioners, *against* UNITED STATES, RESPONDENT.	1911. term. No. 38.

STATE OF NEW YORK, *County of New York, ss:*

Andrew Woelfel, being duly sworn, says that he is upwards of 21 years of age; that on the 10th day of May, 1911, he served the intervening petition of Brooklyn Eastern District Terminal and notice herein on the following-named officers and solicitors by depositing in the Wall Street station of the United States post office in the borough of Manhattan, New York City, N. Y., a true copy thereof, properly enclosed in a postpaid wrapper directed to each of said officers and solicitors, respectively, as follows:

Honorable Attorney General of the United States, Washington, D. C.

Honorable Secretary of the Interstate Commerce Commission, Washington, D. C.

Hugh L. Bond, jr., solicitor for Baltimore and Ohio Railroad, Baltimore, Maryland.

Jackson E. Reynolds, Esq., solicitor for Central Railroad of New Jersey, 143 Liberty Street, New York City.

W. S. Jenney, Esq., solicitor for Delaware, Lackawanna & Western Railroad, 90 West Street, New York City.

George F. Brownell, Esq., solicitor for Erie Railroad Company, 50 Church Street, New York City.

J. F. Schaperkotter, Esq., solicitor for Lehigh Valley Railroad, 143 Liberty Street, New York City.

204 John B. Kerr, Esq., solicitor for New York, Ontario & Western Railway, 56 Beaver Street, New York City.

George Stuart Patterson, solicitor for Pennsylvania Railroad Company, Broad Street Station, Philadelphia, Pa.

ANDREW WOELFEL.

Subscribed and sworn to before me May 11th, 1911.

[SEAL.] WOODHULL HAY,
Notary Public, New York County.

205 And on the same day, to wit, the 12th day of May, 1911, there was filed in the clerk's office of said court, in said entitled cause, a certain notice of motion and petition for leave to intervene and for an injunction, on behalf of John Arbuckle and William A. Jamison, in the words and figures following, to wit:

Notice of motion and intervening petition of John Arbuckle and William A. Jamison.

206 In the United States Commerce Court.

Notice of motion.

THE BALTIMORE AND OHIO RAILROAD Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario and Western Railway Company; and The Pennsylvania Railroad Company, petitioners, *vs.* UNITED STATES, RESPONDENT. JOHN ARBUCKLE AND WILLIAM A. Jamison, intervenors.	May session, 1911. No. 38.

Please take notice that upon the petition of John Arbuckle and William A. Jamison, composing the co-partnership known as the Jay Street Terminal and composing the co-partnership known
207 as Arbuckle Brothers, and upon the proceedings had and testimony taken in a certain proceeding before the Interstate Commerce Commission of the United States upon the complaint of Federal Sugar Refining Company against the railroad companies above named, known as Docket No. 2888, and upon the affidavit of William A. Jamison, sworn and subscribed to May 9, 1911, and upon all the papers and proceedings before this court in the proceeding above entitled, we will move this court at a term thereof to be held on the 17th day of May, 1911, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, at the courtroom of this court in the city of Washington, District of Columbia, for an order of intervention, making the Jay Street Terminal and Arbuckle Brothers parties to this suit or proceeding, and for an order restraining and suspending until the final hearing and determination of this action, the order of the Interstate Commerce Commission, dated December 5, 1910, made in the proceeding above referred to, Docket No. 2888, and for such other and further order and relief as may be just and proper.

Dated New York, May 12, 1911.

DYKMAN, OELAND & KUHN,
Solicitors for Jay Street Terminal and Arbuckle Brothers,
177 Montague Street, Brooklyn, New York.

To THE INTERSTATE COMMERCE COMMISSION.
To the Hon. GEORGE W. WICKERSHAM,
Attorney General, United States.

208 In the United States Commerce Court.

Petition for leave to intervene and for injunction, etc.

BALTIMORE & OHIO RAILROAD COMPANY, and others, petitioners,
against
THE UNITED STATES, RESPONDENT.
JOHN ARBUCKLE AND WILLIAM A. Jamison, intervenors.

To the Judges of the Commerce Court of the United States:

The petition of John Arbuckle and William A. Jamison, located and doing business in the city of New York, respectfully shows:

I. The Jay Street Terminal is a co-partnership composed of John Arbuckle and William A. Jamison, and its business is to maintain and operate the union freight terminal station of the complainant railroad companies located at the foot of Bridge Street, Brooklyn. The co-partners have filed with the clerk of the county of New York, in the State of New York, in accordance with the laws of the State of New York, the certificate necessary to authorize them to do business under the said name.

209 II. Arbuckle Brothers, doing business as refiners of sugar and dealers in green and roasted coffee, is a co-partnership composed of John Arbuckle and William A. Jamison. The co-partners have filed with the clerk of the county of New York, in the State of New York, in accordance with the laws of the State of New York, the certificate necessary to authorize them to do business under the said name.

III. Your petitioners are interested in this controversy and in the question before the Interstate Commerce Commission and in this suit and they desire to intervene and be made parties complainant in the proceedings above entitled, commenced in this court by complainants above named against the United States. The petition of the complainants is for a final decree setting aside and annulling an order of the Interstate Commerce Commission, dated December 5, 1910, by which the complainants above named are required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter, to abstain from paying the Jay Street Terminal for transporting the sugar of Arbuckle Bros. from Brooklyn to the railroads of the complainants in New Jersey, while at the same time paying no such allowances to Federal Sugar Refining Company. Your petitioners are aggrieved by the order referred to and desire to intervene in this action or proceeding.

IV. The Jay Street Terminal owns real estate bordering the East River in the borough of Brooklyn, at or near the foot of Bridge Street, extending along the East River about 1,200 feet and
210 600 feet deep. It has projected piers from this upland into the waters of the East River. Upon the upland it has built freight

houses, warehouses, and a railroad yard with railroad tracks reaching and extending to and over a float bridge. It also owns and operates locomotive steam engines, tugboats, steam lighters, barges, and car floats. The value of the real and personal property in use in the business of Jay Street Terminal exceeds $2,000,000. The real estate is assessed for taxation by the city of New York, for the year 1911, at above $1,700,000. By the contracts set forth in the next paragraph hereof the Jay Street Terminal has devoted its real and personal property to the public uses served by the complainant railroad companies.

V. The Jay Street Terminal has entered into contracts with the complainant railroad companies substantially identical. A copy of one is attached to the petition of the complainant railroad companies, marked Exhibit "A." The contracts with the Baltimore & Ohio Railroad Company and the Central Railroad Company of New Jersey are oral contracts and are terminable by either party at any time. The contracts with the New York, Ontario & Western Railroad Company and the Pennsylvania Railroad Company are made by interchange of letters and are also terminable at any time. The contract with the Delaware, Lackawanna and Western Railroad Company was made April 1, 1910, and terminates March 31, 1915. The contract with the Erie Railroad Company was made February 15, 1906, to terminate March 31, 1910, and continues thereafter until terminated by ninety days' notice in writing by either party to the other. The contract with the Lehigh Valley Company was
211 made March 15, 1906, to terminate March 31, 1910, and continues thereafter until terminated by ninety days' notice in writing by either party to the other.

VI. The complainant railroad companies transport between the Jay Street Terminal and their rail terminals on the western shore of New York Harbor, as a part of the transportation service from the points of shipment to the points of destination, and for the flat New York rate by means of floats carrying cars operated for them under the said contracts between them and your petitioners, freight received at or destined to said Jay Street Terminal station. The complainant railroad companies for several years past have held and now hold themselves out as common carriers to and from Jay Street Terminal, both by their practice of receiving and delivering freight at said point, and by their tariffs, which are now and for several years past have been duly published and filed with the Interstate Commerce Commission. The liability under their respective bills of lading attaches to the railroad companies on west-bound shipments from the time the freight is received at such terminal station and does not end on east-bound shipments until the freight is delivered into the hands of the consignee at such terminal station. The bill of lading issued by the railroad companies for freight so received or delivered by them by its terms covers and includes the movement afloat.

The Jay Street Terminal is a union freight terminal and is designated as a regular public freight terminal of the complainant rail-

road companies in their tariffs duly filed with the Interstate Commerce Commission.

212 Under and pursuant to said contracts the Jay Street Terminal acts as the agent of complainant railroad companies in the receipt, handling and delivery of freight at said terminal and the transportation thereof between said terminal and the rail terminals of complainant railroad companies on the western shore of New York Harbor.

Under and pursuant to said contracts, the said Jay Street Terminal floats east-bound freight from the rails on the western shore of New York Harbor to the docks, wharves and float bridges at Brooklyn and there unloads it from the cars and delivers it to the consignees; it receives west-bound freight from the shippers and loads it into cars and floats the cars loaded to the said rails. It is agreed that a competent superintendent shall be kept upon the premises who shall carry out the directions of complainant railroad companies and said superintendent has authority to issue bills of lading on behalf of each of the several complainant railroad companies for west-bound freight and to sign the same as agent of the railroad companies. Jay Street Terminal also agrees to be responsible for and pay to the railroad companies all freight charges on east-bound freight and all freight charges payable in advance on west-bound freight and accordingly collects and accounts for the same. It agrees to insure against loss or damage by fire or marine risks all freight, cars or property while in its possession, received by it under the provisions of said contracts, said insurance to be for the benefit of the railroad companies and others as their interests shall appear. It also agrees to enforce the car service regulations of the railroad companies as established from time to time and filed and published in accordance with the
213 act to regulate commerce and the amendments thereof and supplements thereto. It performs the movement in either direction of empty cars between the Jay Street Terminal and the railroad companies' terminals on the west shore of New York Harbor; issues waybills and performs other necessary clerical services and in general furnishes all facilities and performs all work and services required for the receipt or delivery of freight as at any public station of the railroad companies; and for the transportation of said freight between the Jay Street Terminal and complainant railroad companies' terminals on the west shore of New York Harbor.

In consideration of these services each of the railroad companies has agreed to pay to Jay Street Terminal, compensation as follows, to wit:

On freight handled by its said agent originating at or destined to points west of the western termini of the contracting railroad companies (that is, west of trunk line territory, which embraces in general all that portion of the United States lying north of the Potomac and Ohio Rivers, and east of Buffalo and Salamanca, New York, and Pittsburg, Pennsylvania), four and one-fifth cents per hundred pounds, and on freight originating at or destined to points east

thereof, three cents per hundred pounds, with certain exceptions noted in said Exhibit "A."

The Jay Street Terminal serves the shippers of a large and important manufacturing and shipping territory, including about one-third of the densely populated part of Brooklyn. It is the only convenient and accessible freight station of the railroad companies for the shippers of that territory. No independent terminals
114 other than the Jay Street Terminal are conveniently accessible
to the shippers of that territory. In no other practicable way could the railroad companies in the past, nor can they at present, serve the large and important shipping interests of this section of Brooklyn, than by the maintenance of the Jay Street Terminal as a public freight station of complainant railroad companies. The Jay Street Terminal was enlarged in 1905 in response to a public demand for a public union railroad freight terminal on the water front of Brooklyn at or near the foot of Bridge Street. A petition of manufacturers and merchants of Brooklyn was presented to the public authorities of the city of New York, setting forth the urgent public necessity of such a terminal and praying that Bridge Street for one block back from the East River should be closed to make the enlargement of the terminal possible. The prayer of the petition was granted and the street closed and for the land in the street, Jay Street Terminal paid the city of New York, $32,000. The enlargement was necessary to accommodate the large and increasing tonnage including the refined sugar offered to the railroad companies at this terminal by Arbuckle Brothers. No claim was ever made by anyone up to 1907, that Jay Street Terminal was for any reason disabled to receive and transport Arbuckle Brothers' sugar and be paid therefor as for other freight of other consignors and in 1909 the Interstate Commerce Commission dismissed the petition of the Federal Sugar Refining Company which challenged such carriage and payment.

The carriage of Arbuckle Brothers' sugar and payment therefor according to the latest decision of the Interstate Commerce Commission were lawful until July, 1909, and according to such
215 decision became unlawful only because of the acts of the
Federal Sugar Refining Company hereinafter set forth and refusals of the complainant railroad companies to make payments to it.

VII. That your petitioners under their firm name, Arbuckle Brothers, operate a sugar refinery in the borough of Brooklyn, located upwards of a block from the Jay Street Terminal. Their shipments of sugar are carted to the terminal by Arbuckle Brothers and handled at the terminal by the Jay Street Terminal in the same way as the freight of hundreds of other shippers, and the freight charges thereon are collected by the Jay Street Terminal in accordance with the regularly published tariffs. That approximately four-fifths of the shipments of sugar made by Arbuckle Brothers through Jay Street Terminal are sold f. o. b. Brooklyn and become the property of the consignee immediately upon delivery to the

terminal and loading into cars at the terminal. That during the first six months of 1907, the bills of lading issued by the Jay Street Terminal for shipments of general merchandise numbered 93,622, of which 3,969 were for your petitioners' sugar and 1,210 for their coffee and their shipments and receipts constituted less than one-third of the total tonnage moving through the terminal. That during the same period the number of different consignees who received freight at the terminal was about 765 and the number of different shippers through the terminal about 560. That the moneys paid to the Jay Street Terminal by the railroad company were no more than a just and reasonable charge and allowance for the services rendered. The year 1907 is selected because the results of that year were shown before the Interstate Commerce Commission.

216 VIII. On information and belief your petitioners further allege:

That the Federal Sugar Refining Company is a corporation of the State of New York, having its executive offices at 138 Front Street, in the city of New York, and having its refineries from which it ships all its outbound products, including sugar, and at which it receives all its inbound supplies for manufacture of sugar and commodities allied thereto, on the east bank of the Hudson River, within the corporate limits of the city of Yonkers, and more than ten miles distant from the northernmost boundary of the lighterage limits of the complainant railroad companies. The said refineries are located on the line of the New York Central and Hudson River Railroad Company, with which they have switch connections and over which the Federal Sugar Refining Company ships the greater part if its output and receives a large part of its inbound shipments. Over this railroad, with few exceptions, the rates to points in the shipping territory of the Federal Sugar Refining Company are the same as the rates from the Jay Street Terminal over the lines of complainant railroad companies. That in order to make shipments of its sugar from Yonkers via the lines of complainant railroad companies, at the New York rate, the Federal Sugar Refining Company must deliver such shipments to the New York Central and Hudson River Railroad Company at Yonkers, thence to be transported by that railroad to New York and there delivered to complainant railroad companies at points within the lighterage limits. Because of alleged delay in the handling and transportation of such shipments via the route aforesaid, the Federal Sugar Refining Company prefers
217 to deliver said shipments directly to complainant railroad companies by lighter within the lighterage limits. Prior to July, 1909, the Federal Sugar Refining Company of Yonkers, the predecessor of the Federal Sugar Refining Company, was accustomed to deliver its shipments at Yonkers to the Ben Franklin Transportation Company, which transported the same direct to the terminals of complainant railroad companies on the west shore of New York Harbor, at a charge to the Federal Sugar Refining Company of Yonkers of three cents per hundred pounds.

In the month of May, 1907, the Federal Sugar Refining Company of Yonkers, filed a complaint with the Interstate Commerce Commission against complainant railroad companies, alleging that the complainant through the Ben Franklin Transportation Company performed the same service on its shipments of sugar as were said to be performed by the Brooklyn Eastern District Terminal on shipments of the American Sugar Refining Company and by the Jay Street Terminal on shipments of the Arbuckle Brothers; that the lighterage limits prescribed by complainant railroad companies were unduly discriminatory in that they did not extend to Yonkers and include the refinery of the Federal Sugar Refining Company of Yonkers, and permitted allowances to be made on shipments of sugar from the refineries of your petitioners and the American Sugar Refining Company, while not so permitting on the complainant's shipments because the latter was located outside the prescribed limits. Said practice was said to result in unjust discrimination and undue prejudice, and to oblige the Federal Sugar Refining Company to pay unreasonable rates. A copy of said complaint is annexed to
218 the petition of the complainant railroad companies and marked Exhibit "B." A copy of the answer filed by one of the complainant railroad companies is thereto annexed and marked Exhibit "C." and is representative of the answers filed by all of the complainant railroad companies. Hearings were held thereafter and on the 24th day of June, 1909, in the aforesaid proceeding known as docket No. 1082, the said Interstate Commerce Commission made its report and order, a copy of which is annexed to the petition of the complainant railroad companies and marked Exhibit "D." The said report and order of the Interstate Commerce Commission in docket No. 1082, was to the effect that said complaint should be dismissed because the extension of the lighterage limits in New York Harbor was a matter of business discretion and that said Commission had no authority to require such extension beyond the then prescribed boundaries, and that complainant being located outside of the prescribed lighterage limits was not subjected to unlawful discrimination by reason of the practice of complainant railroad companies in affording free lighterage on shipments originating at or destined to points within said lighterage limits, while refusing to so afford on complainant's shipments.

On information and belief your petitioners further allege: That as a device to appear to ship from within the lighterage limits, and within a month after the issuance of said report and order, a new corporation known as the "Federal Sugar Refining Company" was organized, which established its principal office at 138 Front Street, New York City, and took over the refineries heretofore mentioned in the city of Yonkers, and adopted the following practice:
219 Contracts of sale or orders for sugar were received at 138 Front Street, and each of said orders was given a separate contract number and said order bearing the contract number was forwarded to the refinery where the order was filled and the barrels

or bags were stamped with the contract number and placed on a lighter. The shipment bearing the contract number remained intact until it reached the hands of the buyer. The refinery received shipping instructions from 138 Front Street, and these shipping instructions showed the contract number, the ultimate destination and the rail line over which the shipment was to be transported. The captain of the lighter of the Ben Franklin Transportation Company gave a receipt to the refinery and received from the refinery a so-called bill of lading which was no more than a form of railroad bill of lading filled in by the Federal Sugar Refining Company and designating a consignment to the Federal Sugar Refining Company, 138 Front Street, New York City, to be transported by the Ben Franklin Transportation Company, and showing the contract number with which the shipment had been marked. The said document or alleged bill of lading was not signed by the Ben Franklin Transportation Company through any of its officers, or the captain of the lighter or by any other carrier. There was nothing in any of the documents which called for transportation to Pier 24, North River. The said shipping instructions sent from 138 Front Street to Yonkers were to ship to "Federal Sugar Refining Company,"—138 Front Street, City.—" B. F. T. Co. (B. & O.)" or other initials representing the Ben Franklin Transportation Company and one of
220 complainant railroad companies as the case may have been.

That none of complainant railroad companies could or did perform any transportation service in connection with the Ben Franklin Transportation Company between Yonkers and 138 Front Street, and such shipping instructions were in fact directions to deliver said shipments to the Ben Franklin Transportation Company to be lightered and delivered to one of the railroad companies at its terminal on the west shore of New York Harbor. The practice has been for the lighter of the Ben Franklin Transportation Company to go to Pier 24, North River, New York, part of which pier is leased to the Ben Franklin Transportation Company, where the captain of the lighter called up the office of the Federal Sugar Refining Company at 138 Front Street, and reported the particular shipment then on his lighter. The captain of the lighter was then handed a form of bill of lading not signed by any of complainant railroad companies and showing the name and address of the consignor as the Federal Sugar Refining Company, 138 Front Street, New York, Franklin Street, Pier 24, North River. The lighter then proceeded to the rail terminus of such of complainant railroad companies as had been previously designated in the shipping instructions sent to Yonkers, and there deliver the shipment and obtained the signature of the railroad agent at said terminus upon the form of bill of lading theretofore prepared and delivered to said captain as aforesaid, and said bill of lading was stamped by the said agent to show the receipt of the shipment at said station on the west shore of New York Harbor.

That such shipments were handled under contract between
221 the Ben Franklin Transportation Company and the Federal

Sugar Refining Company for a compensation of three cents per hundred pounds, although the said contract provides for a compensation of four cents per hundred pounds on sugar lightered from Yonkers to Pier 24, North River, payments for said service being made to the Ben Franklin Transportation Company under that provision which provides for a compensation of three cents per hundred pounds for sugar lightered from Yonkers to complainant railroad companies' rail termini.

IX. That having established the practice hereinbefore described, the said Federal Sugar Refining Company filed a complaint in October, 1909, with the Interstate Commerce Commission against complainant railroad companies, a copy of which together with a copy of the answer of one of complainant railroad companies as representative of the answers filed by all of complainant railroad companies are annexed to the petition herein of the railroad companies and marked Exhibits "E" and "F," respectively. Said complaint alleged in substance that the interstate transportation of the product of the said Federal Sugar Refining Company began at Pier 24, North River, borough of Manhattan, a point within the lighterage limits as aforesaid, and that said Jay Street Terminal is owned and conducted by co-partners, named John Arbuckle and William A. Jamison, which said co-partners owned, maintained and operated also a sugar refinery at the foot of Jay Street, borough of Brooklyn. The petition also alleged that said amounts of three cents per hundred pounds and four and one-fifth cents per hundred pounds were paid to said co-
222 partners for the lightering of their sugar from Jay Street,
Brooklyn, to the rail termini of complainant railroad companies on the west bank of New York Harbor and that inasmuch as the said Federal Sugar Refining Company was a competitor of the said Arbuckle and Jamison in the sugar business, it constituted an undue and unreasonable prejudice and disadvantage against said Federal Sugar Refining Company to pay said amounts of three cents and four and one-fifth cents per hundred pounds for the handling of sugar to said Arbuckle and Jamison and not to pay similarly to the said Federal Sugar Refining Company.

X. That hearings were had before the Interstate Commerce Commission upon the last-mentioned complaint on the 25th day of February, 1910, and on the 13th day of April, 1910; and subsequently, to-wit, on the 6th day of March, 1911, the Interstate Commerce Commission issued its report and order against complainant railroad companies, being the order first hereinabove referred to, a copy of which report and order is attached to the petition of the railroad companies and marked Exhibit "G," requiring complainant railroad companies to cease and desist on or before the 15th day of April, 1911, and for a period of not less than two years thereafter, to abstain from paying what the said Interstate Commerce Commission has termed allowances to said John Arbuckle and William A. Jamison, co-partners trading under the firm name of Arbuckle Brothers, on the sugar of the latter, while at the same time paying no such allow-

ances to said Federal Sugar Refining Company on its sugar. The order makes it optional with the railroad companies to keep or break their contracts with Jay Street Terminal, depending on
223 their election to pay or not to pay the contract prices to Federal Sugar Refining Company.

XI. That payment to the Federal Sugar Refining Company for lighterage service from Pier 24, North River, to any terminal of the railroad companies on the western shore of New York Harbor of the same amount which may reasonably be paid and is paid to the Jay Street Terminal for the performance of the floating service furnished by it would be an unjust and unreasonable allowance to the Federal Sugar Refining Company, and a discrimination against your petitioners, and therefore in violation of the law, inasmuch as the lighterage from Pier 24, North River, to the western shore of New York Harbor costs the Federal Sugar Refining Company nothing, being included without extra charge in the service required by it from Yonkers to the lighterage limits by reason of the fact of the location of its plant at Yonkers.

If, on the other hand, complainant railroad companies should comply with said order of the Commission by not paying any allowance as aforesaid to said Federal Sugar Refining Company and refraining from paying any compensation to the Jay Street Terminal for transporting Arbuckle Brothers' sugar, then your petitioners would be deprived of their property without due process of law, their contracts with the railroad companies would be broken and cancelled, their real estate, docks, railroad yards, railroad warehouses, platforms, and their railroad and floating equipment would be of diminished value, and they would be denied the full use of their property or just and reasonable compensation for the use of their property.

224 XII. That the Commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in finding in said report and order that the practice of stopping the lighter at Pier 24, North River, en route from Yonkers to Jersey City, or other terminal of one of complainant railroad companies, as above described, is different in substance or in legal effect from the practice formerly followed by the Federal Sugar Refining Company of having shipments lightered direct from Yonkers to such terminal, and differentiates the present case from that formerly before the Commission in docket No. 1082, and in holding that by reason of the stoppage of such lighter at Pier 24, North River, the shipments of the Federal Sugar Refining Company, originate within lighterage limits. Such finding is wholly unsupported by evidence.

XII. That the Commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law and otherwise erred in finding in said report and order that complainant railroad companies refused to bear the burden of lightering across the river sugar for the Federal Sugar Refining Company, inasmuch as complainant railroad companies now and at all times referred to

in this petition hold themselves out, and have held themselves out, as ready to accept shipments of the Federal Sugar Refining Company at any point within the lighterage limits and to lighter the same to their respective terminals on the western shore of New York Harbor at their own expense. Such finding is wholly unsupported by evidence.

XIV. That the Commission violated the constitutional
225 rights of your petitioners, exceeded the powers delegated to it
by law, and otherwise erred in finding in said report and order that Arbuckle Brothers delivered their shipments to complainant railroad companies on the Jersey shore at their own risk, and that at that point and time the liability of complainant railroad companies as common carriers commenced, and that up to that point there is no transportation of the sugar, but only an accessorial service by Arbuckle Brothers in delivering their own shipments to the carrier for transportation. That such sugar of Arbuckle Brothers is in fact covered by the bill of lading of one of complainant railroad companies from the time that it is delivered to the Jay Street Terminal for shipment, and the complainant railroad company whose bill of lading is thus issued is legally liable, if the bill of lading be an order bill of lading to the lawful holder thereof, and if it be a straight bill of lading to the consignee or owner of the shipment, who in either case may be and generally is a party other than Arbuckle Brothers from the time of such delivery to the Jay Street Terminal. That the service performed by the Jay Street Terminal is not an accessorial service but a service connected with and a part of the transportation and the furnishing of instrumentalities used therein, inasmuch as such service and the furnishing of such instrumentalities is covered by the tariffs of complainant railroad companies on file with the Interstate Commerce Commission and is a service which complainant railroad companies hold themselves out as common carriers to perform under such tariffs and by their general practice, and which may lawfully be performed by the owner of property with respect to his own property for a just and reasonable com-
226 pensation paid by the carrier. Such finding is wholly unsup-
ported by evidence.

XV. That the Commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in its report and order in holding that complainant railroad companies may not lawfully employ, for public station facilities, the facilities owned and operated by Jay Street Terminal, and make reasonable compensation therefor to the owner thereof without at the same time permitting Federal Sugar Refining Company to perform a different service for the same compensation. Such finding is wholly unsupported by evidence.

XVI. That the Commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in its report and order in finding that Arbuckle Brothers and the Federal Sugar Refining Company provide similar facilities and perform the same service in the transportation of their

property to the terminals of complainant railroad companies on the western shore of the Hudson River. Such finding is wholly unsupported by evidence.

XVII. That the Commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in its report and order in finding that the contractual arrangement between complainant railroad companies and the Jay Street Terminal saves Arbuckle Brothers the expense of teaming or conveying the merchandise to a public terminal. Such finding is wholly unsupported by the evidence.

227 XVIII. That the Commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in finding in its report and order that complainant railroad companies make an allowance to Arbuckle Brothers for the lighterage of their sugar. All payments made by complainant railroad companies to the Jay Street Terminal are made on account of all the services performed and the facilities furnished by the Jay Street Terminal, and the payments of three cents and four and one-fifth cents per hundred pounds in connection with particular shipments, are not payments made for lighterage service alone or in respect of any particular shipment, and are not dependent upon the ownership or the shipper of any particular shipment, but are made as a means and measure of compensation for all the general service performed on behalf of complainant railroad companies by said Jay Street Terminal as a whole. Such finding is wholly unsupported by evidence.

XIX. That the Commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law and otherwise erred in its report and order in requiring an allowance to be made to the Federal Sugar Refining Company for a lighterage service measured by the amount paid to the Jay Street Terminal for the floating service performed by it. Such payments to the Federal Sugar Refining Company, if made at all, must be made for the performance by it of a part of the lighterage service from Pier 24 to the terminals of complainant railroad companies on the western shore of New York Harbor, and must be a just and reasonable compen-
228 sation for such service and not measured by the payment made to the Jay Street Terminal. Such finding is wholly unsupported by evidence.

XX. That the Commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law and otherwise erred in its report and order in finding that complainant railroad companies unduly discriminated against the Federal Sugar Refining Company and unduly preferred Arbuckle Brothers in violation of the act to regulate commerce, because:

(*a*) The circumstances and conditions attending the shipment and transportation of Arbuckle Brothers sugar from the Jay Street Terminal are substantially dissimilar from the circumstances and conditions attending the shipments of the Federal Sugar Refining Company as shown by the facts hereinbefore set forth.

(*b*) No preference or advantage accrues to Arbuckle Brothers or prejudice or disadvantage is sustained by the Federal Sugar Refining Company by reason of the lighterage of the sugar of Arbuckle Brothers by the Jay Street Terminal, and the payment by complainant railroad companies to said Jay Street Terminal of a just and reasonable amount therefor, and the refusal of complainant railroad companies to make an allowance to the Federal Sugar Refining Company for the lighterage of its sugar to the terminals of complainant railroad companies on the west shore of New York Harbor. The payment to the Jay Street Terminal being no more than just and reasonable compensation for the service performed is only equivalent to the performance of that service by com-
229 plainant railroad companies, which complainant railroad companies would be required to and would perform with their own equipment if the floating of such sugar by the Jay Street Terminal and the payment therefor were discontinued. Complainant railroad companies now, and during all the time referred to in this petition, hold themselves out and have held themselves out as willing to perform the same service from any point within the lighterage limits for the Federal Sugar Refining Company in accordance with their tariffs on file with the Interstate Commerce Commission. Whatever disadvantage the Federal Sugar Refining Company may be under arises out of the location of its refineries at Yonkers, beyond the lighterage limits of complainant railroad companies. Such finding is wholly unsupported by evidence.

XXI. That if the complainant railroad companies are obliged to obey the order of the commission pending final determination of this action your petitioners will suffer and sustain irreparable damage. Either the railroad companies will discontinue compensation to the Jay Street Terminal for transportation of Arbuckle Bros. sugar or they will pay to the Federal Sugar Refining Company for its lighterage service the same compensation they pay to the Jay Street Terminal for its floating service. If they discontinue compensation to Jay Street Terminal it must transport Arbuckle Bros. sugar without compensation or greatly decrease its business and plant. If the complainant railroad companies pay the same compensation to the Federal Sugar Refining Company for lighterage service as they pay the Jay Street Terminal for floating service, an unjust
230 discrimination is worked against Arbuckle Bros. as refiners of sugar. A great public wrong would be done by the crippling of the Jay Street Terminal as a public station, which would follow the diminution of the transportation facilities it could offer if it were forced by the order complained of to curtail its service. Forty per cent of the freight handled in 1910 was Arbuckle Brothers' sugar, and if the Jay Street Terminal may not handle this sugar it must greatly cut down its service and great inconvenience and expense to a great number of shippers and receivers of freight would follow who have no access to private wharves or piers and who would be required to transport their shipments by truck to and from distant public stations.

Wherefore your petitioners pray:

1. That they may intervene and be made parties to this record and joined as petitioners with the petitioning railroad companies;

2. That a final decree may be entered herein setting aside and annulling the order of the Interstate Commerce Commission, dated December 5, 1910;

3. That a temporary injunction may issue herein suspending said order and any and all proceedings thereunder pending the final determination of this proceeding.

Dated, New York, May 12, 1911.

DYKMAN, OELAND & KUHN,
Solicitors for Petitioners.

231 STATE OF NEW YORK, *County of Kings, ss:*

William A. Jamison, being duly sworn, says that he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

WILLIAM A. JAMISON.

Sworn to before me this 12th day of May, 1911.

[SEAL.] HENRY J. RENDICH,
Notary Public, Kings Co.

232 And on the same day, to wit, the 12th day of May, 1911, there was filed in the clerk's office of said court, in said entitled cause, a certain motion of the respondent, the United States, by the Attorney General of the United States, in the words and figures following, to wit:

Motion of the United States to dismiss.

233 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario and Western Railroad Company; and The Pennsylvania Railroad Company, petitioners,
v.
THE UNITED STATES.
} No. 38.

Motion of the United States to dismiss the petition.

The Attorney General of the United States of America, in behalf of the United States, moves the court to dismiss the petition upon the following grounds, viz:

(1) It appears from the said petition and the exhibits that the same are insufficient, as not setting forth a cause of action upon which the court may grant the relief prayed or any part of the same.

(2) It appears from the said petition and the exhibits that the said petitioners have not shown that there is any equity in their said petition upon which to grant the relief prayed or any part of the same, or that they are entitled to the relief prayed or to any part of the same.

234 (3) It appears from the said petition and the exhibits that the said petitioners have not in and by their said petition shown that in making its said order the Interstate Commerce Commission acted beyond its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce.

(4) It appears from the said petition and the exhibits that the said petitioners have not in and by their said petition shown that in making its said order the Interstate Commerce Commission violated any right of the petitioners protected by the Constitution of the United States or any other right of the said petitioners over which this court may exercise jurisdiction.

(5) That in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with its decision, order, or requirement in the premises, said Interstate Commerce Commission found that the transportation of the sugar of Arbuckle Brothers and the transportation of the sugar of Federal Sugar Refining Company in fact commenced at the termini of the said petitioners on the Jersey shore, and that the actual contractual relation between the said two shippers and the said petitioners for the transportation and the liability of the said petitioners as common carriers did not commence previous to the time the sugar of each shipper was delivered
to the said petitioners at that point; all of which were matters
235 within the power of that body to hear and determine, and its
report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to disturb the same.

(6) That in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with its decision, order, or requirement in the premises, the said Interstate Commerce Commission found that the services rendered by the Federal Sugar Refining Co. and the services rendered by Arbuckle Bros. in delivering sugar to the petitioners at the Jersey shore were similar services; and that in granting the allowance to Arbuckle Bros. and withholding the same from the Federal Sugar Refining Co. the petitioners unduly discriminate against said Federal Sugar Refining Co. and unduly prefer the said Arbuckle Bros. in violation of the act to regulate commerce; all of which were matters within the power of that body to hear and determine, and its said report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to disturb the same.

(7) That in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion together with its decision, order, or requirement in the premisess, said Interstate Commerce Commission found that the terms under which the petitioners accept the
236 sugar of Arbuckle Bros. at their regular stations west of the river result in inequalities, preferences, and discriminations, and are unduly and unjustly prejudicial to the rights of the Federal Sugar Refining Co. as a shipper of sugar over the lines of the petitioners in competition with Arbuckle Bros. in the same markets, in violation of the act to regulate commerce; all of which were matters within the power of that body to hear and determine, and its said report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to disturb the same.

(8) That in its report in writing, which states its conclusion together with its decision, order, or requirement in the premises, it appears that in the proceedings had and taken before the Interstate Commerce Commission, that body heard and determined matters within its power and authority, and its report made and order entered are conclusive upon the court; and the matters and things alleged in the petition are insufficient to disturb the same.

Wherefore and for divers other good causes appearing from the face of the said petition and the exhibits, this defendant prays that its motion be sustained and that the said petition be dismissed at the petitioners' cost, and that it be not required to make any answer thereto; and for such other and further action as may be appropriate.

GEO. W. WICKERSHAM,
Attorney General of the United States.

237 And afterwards, to wit, on the 17th day of May, 1911, there was filed and entered in the clerk's office of said court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order granting Brooklyn Eastern District Terminal leave to intervene.

238 In the United States Commerce Court.

BALTIMORE AND OHIO RAILROAD COMPANY ET AL., petitioners.
v.
THE UNITED STATES, RESPONDENT.
No. 38.

On motion of Brooklyn Eastern District Terminal, a corporation of the State of New York, by Henry B. Closson, its solicitor, in open court made, notice in that behalf having been duly served, that the

said Brooklyn Eastern District Terminal be allowed to intervene and become a party to the above-entitled proceeding, and having duly filed and presented a petition in that behalf:

It is ordered that the said Brooklyn Eastern District Terminal be and it hereby is allowed to intervene in and become a party to the above-entitled cause, and to be represented by its counsel.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

[Seal of the
United States
Commerce Court.]

239 And on the same day, to wit, on the 17th day of May, 1911, there was filed and entered in the clerk's office of said court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order granting John Arbuckle and William A. Jamison leave to intervene.

240 In the United States Commerce Court.

BALTIMORE AND OHIO RAILROAD COMPANY ET AL., petitioners,
v.
THE UNITED STATES, RESPONDENT.
} No. 38.

On motion of John Arbuckle and William A. Jamison, composing the copartnership known as the Jay Street Terminal and composing the copartnership known as Arbuckle Brothers, by William N. Dykman, their solicitor, in open court made, due notice having been given in that behalf, that they be allowed to intervene and become parties to the above-entitled proceedings, and having duly filed and presented a petition in that behalf:

It is ordered that the said John Arbuckle and William A. Jamison, composing the copartnership known as the Jay Street Terminal and composing the copartnership known as Arbuckle Brothers, be and they are hereby allowed to intervene in and become parties to the above-entitled cause and to be represented by their counsel.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

[Seal of the
United States
Commerce Court.]

241 And on the same day, to wit, the 17th day of May, 1911, there was filed and entered in the clerk's office of said court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order extending motions to dismiss petition to cover intervening petitions.

242 In the United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY ET AL., petitioners, *vs.* UNITED STATES, RESPONDENT.	No. 38.

On motion of the respondent, the United States, by Blackburn Esterline, special assistant to the Attorney General, in open court made, it is by the court ordered: That the motion filed by the United States to dismiss the petition in the above entitled cause filed by the petitioners be extended to and made a motion to dismiss the intervening petition of John Arbuckle and William A. Jamison, and the intervening petition of Brooklyn Eastern District Terminal filed in the above-entitled cause; and it is further ordered: That the said motion to dismiss the petition shall be taken and considered as a motion also to dismiss the said two intervening petitions to the same extent and in the same manner as if the said motion were filed and made to each of the said intervening petitions to dismiss the same and each of them.

And on motion of the Interstate Commerce Commission, by P. J. Farrell, its counsel, in open court made, it is further ordered: That the motion filed by the Interstate Commerce Commission and the Federal Sugar Refining Company to dismiss the petition in the above-entitled cause filed by the petitioners, be extended to and made a motion to dismiss the intervening petition of John Arbuckle and William A. Jamison, and the intervening petition of Brooklyn Eastern District Terminal filed in the said cause; and it is further ordered: That the said motion to dismiss the petition shall be taken and considered as a motion also to dismiss the said two inter-
243 vening petitions to the same extent and in the same manner as if the said motion were filed and made to each of the said intervening petitions to dismiss the same and each of them.

By the Court:

[Seal of the United States Commerce Court.]

MARTIN A. KNAPP,
Presiding Judge.

244 And on the same day, to wit, the 17th day of May, 1911, there was filed and entered in the clerk's office of said court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order excluding evidence taken before Interstate Commerce Commission.

245 In the United States Commerce Court.

BALTIMORE AND OHIO RAILROAD COMPANY ET AL., petitioners, v. THE UNITED STATES, RESPONDENT. } No. 38.

This cause coming on to be heard on the motions for a temporary restraining order of the petitioners and the intervening petitioners; and on the motion of the respondent, the United States, to dismiss the petition; and on the motion of the respondents, Interstate Commerce Commission and Federal Sugar Refining Company, to dismiss the petition;

On motion of counsel for the United States and of counsel for the Interstate Commerce Commission in open court made, it is ordered that the evidence taken in a certain proceeding before the Interstate Commerce Commission wherein Federal Sugar Refining Company was complainant and the said petitioners were defendants, and known as docket No. 2888, and each and every part of the same be, and it is hereby, excluded from the record and proceedings in this cause on the hearing on the motions for a temporary restraining order and on the motions to dismiss the petition.

By the court:

[Seal of the United States Commerce Court.]

MARTIN A. KNAPP,
Presiding Judge.

246 And on the same day, to wit, the 17th day of May, 1911, being one of the days of the May session of said court, 1911, in the proceedings thereof in said entitled cause before the Honorable Martin A. Knapp, presiding judge, and the Honorables Robert W. Archbald, William H. Hunt, John E. Carland, and Julian W. Mack, Judges, appears the following entry, to wit:

Hearing on motions for preliminary injunction and on motions to dismiss.

Thereupon the court announced that the petitions for a temporary injunction and the motions to dismiss would be heard together, and the court further announced that the petitions for a temporary injunction should have precedence.

Thereupon, said cause coming on to be heard upon the motions of the petitioners and the intervening petitioners for a temporary injunction and upon the motions of the respondent and the intervening respondents to dismiss the petitions, all of the parties being represented by their respective counsel, the arguments of counsel

were commenced. George F. Brownwell, Esq., appearing for the petitioners; William N. Dykman, Esq., for intervening petitioners, John Arbuckle and William A. Jamison; Henry B. Closson, Esq., for intervening petitioner, Brooklyn Eastern District Terminal; Blackburn Esterline, Esq., for the respondent, the United States; and E. A. Bigelow, for the intervening respondent, Federal Sugar Refining Company.

Thereupon said cause was continued for further hearing until to-morrow morning.

247 And on the 18th day of May, 1911, being one of the days of the May session of said court, 1911, in the proceedings thereof in said entitled cause before the Honorable Martin A. Knapp, presiding judge, and the Honorables Robert W. Archbald, William H. Hunt, John E. Carland, and Julian W. Mack, judges, appears the following entry, to wit:

Cause taken under advisement.

Said cause came on for further hearing before the court upon the petitions for temporary injunction and the motions to dismiss, all the parties being represented by their respective counsel, and the arguments of counsel were concluded; E. A. Bigelow, Esq., appearing for intervener Federal Sugar Refining Company; George F. Brownell, Esq., for the petitioners; and P. J. Farrell, Esq., for Interstate Commerce Commission. Upon request of Mr. Esterline, the United States was allowed until May 20th to file a brief on its motion to dismiss, and Mr. Brownell was allowed five days from that date to file a brief in reply.

Thereupon said cause was taken under advisement by the court.

248 And afterwards, to wit, on the 22nd day of May, 1911, there was filed and entered in the clerk's office of said court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order denying motions to dismiss.

249 In the United States Commerce Court.

THE BALTIMORE & OHIO RAILROAD COMPANY et al., petitioners. *vs.* THE UNITED STATES, RESPONDENT.	May term, 1911. No. 38.

On motions to dismiss the petition filed in said action for the reason that the facts therein stated do not constitute a cause of action.

Mr. P. J. Farrell, Mr. Blackburn Esterline, and Mr. Ernest A. Bigelow, counsel for intervening defendants, appearing for the mo-

tions; and Mr. George F. Brownell, solicitor for the petitioners; Mr. Closson, solicitor for the intervening petitioner, Brooklyn Eastern District Terminal; and Mr. Dykman, solicitor for the intervening petitioners John Arbuckle and William A. Jamison, doing business under the firm name of the Jay Street Terminal, appearing contra.

The above entitled cause came on for hearing before the United States Commerce Court at a regular session of said court held in the city of Washington on the 17th day of May, 1911, upon motions made by the United States, the Interstate Commerce Commission, and the Federal Sugar Refining Company to dismiss.

And the court having considered said motions and the arguments of counsel in support thereof and the petition filed in said cause, and due consideration thereof being had,

Now, on this 22d day of May, 1911, it is ordered and adjudged that said motions be, and the same are hereby, denied, with leave to the defendants making said motions to answer the petition of the petitioners within twenty (20) days from the date hereof, if they shall be so advised.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

[Seal of the
United States
Commerce Court.]

250 And on the same day, to wit, the 22d day of May, 1911, there was filed and entered in the clerk's office of said court, in said entitled cause, a certain order, which said order, and the marshal's returns endorsed thereon, are in the words and figures following to wit:

Order granting motion for temporary injunction.

251 In the United States Commerce Court.

THE BALTIMORE & OHIO RAILROAD COMPANY et al., petitioners,
v.
UNITED STATES, RESPONDENT.

May term. 1911. No. 38.

On motion for a temporary injunction enjoining the enforcement of an order of the United States Interstate Commerce Commission, made December 5th, 1910, and effective on or before the 15th day of April, 1911, said last-mentioned date having been extended by the commission to June 1st, 1911.

Mr. George F. Brownell, solicitor for the petitioners; Mr. Closson, solicitor for the intervening petitioner, Brooklyn Eastern District Terminal; and Mr. Dykman, solicitor for the intervening petitioners, John Arbuckle and William A. Jamison, doing business under the firm name of the Jay Street Terminal, appearing for the motion.

Mr. P. J. Farrell, Mr. Blackburn Esterline, and Mr. Ernest A. Bigelow, counsel for intervening defendants, appearing contra.

The above-entitled cause came on for hearing before the United States Commerce Court at a regular session thereof held at the city of Washington May 17th, 1911, upon the petition of the petitioners and the intervening petitions of the Brooklyn Eastern District Terminal and the Jay Street Terminal, and affidavits submitted by petitioners in support of their petition.

The court having heard the arguments of counsel, and considered the pleadings and affidavits presented in support of the motion, and having given the same due consideration:

252 Now, on this 22d day of May, 1911, it is ordered and adjudged that the motion for a temporary injunction for the purposes herein mentioned be, and the same is hereby, granted.

And it is further ordered and adjudged that said order, to wit:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof, and having found that the allowances paid by the above-named defendants to Arbuckle Brothers on their sugar brought by them on floats from lighters to the regular terminals of defendants on the Jersey shore in the State of New Jersey, while at the same time paying no such allowances to complainant on its sugar brought by it on lighters to the defendants' said regular terminals on the Jersey shore, unduly discriminate against said complaints and unduly prefer said Arbuckle Brothers, in violation of the act to regulate commerce:

"It is ordered, that the above-named defendants be, and they are hereby, notified and required to cease and desist, on and after the 15th day of April, 1911, and for a period of not less than two years thereafter, abstain from paying such allowances to Arbuckle Brothers on their sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce,"

and its force and effect be, and the same hereby is, suspended until the further order of this court.

And it is further ordered and adjudged that a duly certified copy of this order be served upon the chairman of the Interstate Commerce Commission.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

[Seal of the
United States
Commerce Court.]

Certified copy of the foregoing order served on the chairman of the Interstate Commerce Commission this 23rd day of May, 1911.

F. J. Starek, *Marshal.*

Accepted by:

W. J. Howell.

Certified copy of the foregoing order served on the Attorney General of the United States this 25th day of May, 1911.

F. J. Starek, *Marshal.*

Accepted by:

B. M. Moore (for Blackburn Esterline).

253 And afterwards, to wit, on the 12th day of June, 1911, came the intervening respondents, the Interstate Commerce Commission and the Federal Sugar Refining Company by their solicitors, and filed in the clerk's office of said court, in said entitled cause, their certain petition for appeal, in the words and figures following, to wit:

Petition for appeal by Interstate Commerce Commission and Federal Sugar Refining Company.

254 In the United States Commerce Court.

(In equity, No. 38.)

The Baltimore & Ohio Railroad Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and The Pennsylvania Railroad Company, petitioners, and William A. Jamison, John Arbuckle, and Brooklyn Eastern District Terminal, intervening petitioners, *v.* The United States, respondent, and Interstate Commerce Commission and Federal Sugar Refining Company, intervening respondents.	May session, 1911. No. 38.

Petition for appeal.

The Interstate Commerce Commission and the Federal Sugar Refining Company, intervening respondents in the above-entitled cause,

by their respective solicitors, represent that in the decree or order of said Commerce Court in said cause, rendered on the 22d day of May, 1911, there was manifest error to their injury, and therefore pray for an order granting an appeal from said decree to the Supreme Court of the United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
ERNEST A. BIGELOW,
Solicitor for Federal Sugar Refining Company.

255 And on the same day, to wit, the 12th day of June, 1911, came the intervening respondents, the Interstate Commerce Commission and the Federal Sugar Refining Company, by their solicitors, and filed in the clerk's office of said court, in said entitled cause, their certain assignment of errors, in the words and figures following, to wit:

Assignment of errors by Interstate Commerce Commission and Federal Sugar Refining Company.

256 In the United States Commerce Court.

(In Equity, No. 38.)

THE BALTIMORE & OHIO RAILROAD COMPANY: The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and the Pennsylvania Railroad Company, petitioners, and William A. Jamison, John Arbuckle, and Brooklyn Eastern District Terminal, intervening petitioners, *v.* THE UNITED STATES, RESPONDENT, AND INTERstate Commerce Commission and Federal Sugar Refining Company, intervening respondents.	May session. 1911.

Assignment of errors.

And now, on the 12th day of June, 1911, come the above named intervening respondents, Interstate Commerce Commission and Federal Sugar Refining Company, by their respective solicitors, and say that the decree in the above entitled cause is erroneous and against the just rights of said respondents for the following reasons:

First. The court erred in not dismissing the petition for want of equity.

Second. The court erred in granting the temporary injunction enjoining enforcement of the order of the Commission for the following reasons:

(*a*) That said petitioners, including said intervening
257 petitioners, have not, nor has any of them, in and by their said petitions, or any of them, shown that the legislative department of the Government of the United States is, or ever has been, without power to grant the authority exercised by the Commission in making said order.

(*b*) That said petitioners, including said intervening petitioners, have not, nor has any of them, in and by said petitions, or any of them, shown that said legislative department did not duly confer upon this Commission the authority exercised by this Commission in making said order.

(*c*) That said petitioners, including said intervening petitioners, have not, nor has any of them, in and by said petitions, or any of them, shown that the subject matter of said order is not within the jurisdiction conferred upon the Commission by said legislative department.

(*d*) That said petitioners, including said intervening petitioners, have not, nor has any of them, in and by said petitions, or any of them, shown that in making said order the Commission exercised authority in excess of the authority conferred upon it by said legislative department.

(*e*) That said petitioners, including said intervening petitioners, have not, nor has any of them, in and by said petitions, or any of them, shown that in making said order the Commission exercised either unreasonably or unlawfully the authority or any of the authority conferred upon it by said legislative department.

(*f*) That said petitioners, including said intervening petitioners, have not, nor has any of them, in and by said petitions, or any of them, shown that in making said order the Commission violated any constitutional or other right of said petitioners, or of any of
258 said petitioners, over which the Commerce Court exercised or may exercise jurisdiction.

Third. The court erred in holding that the transportation and transportation services of the petitioners, relating to the shipments of sugar made by Arbuckle Brothers, do not begin at the respective termini of the petitioners on the Jersey shore.

Fourth. The court erred in holding that the shipments of sugar delivered by the Federal Sugar Refining Company for transportation, to the petitioners at the respective termini of the petitioners on the Jersey shore, do not originate at Pier 24 in New York City.

Fifth. The court erred in holding that the practice of the petitioners of paying allowances per one hundred pounds of three cents and four and one-fifth cents on said Arbuckle Brothers' shipments, and refusing to pay either like allowances or any allowances on the said Federal Sugar Refining Company shipments, does not constitute the discrimination and preference and prejudice prohibited by sections 2 and 3 of said act.

Sixth. The court erred in holding that said discrimination can not be held to be unlawful in the absence of a showing that the allowances paid to Arbuckle Brothers are unreasonable in and of themselves.

Seventh. The court erred in holding that it is proper to consider how and by whom the sugar transported is handled previous to the time when it is offered to the petitioners for transportation at their respective termini on the Jersey shore in determining whether or not said Arbuckle Brothers' shipments are transported by petitioners under circumstances and conditions which are substantially similar to the circumstances and conditions pertaining to the transportation by petitioners of said Federal Sugar Refining Company shipments.

259 Eighth. The court erred in substituting its own judgment for the judgment of the Commission concerning the question of whether or not said Arbuckle Brothers' shipments, as compared with said Federal Sugar Refining Company shipments, are a like kind of traffic.

Ninth. The court erred in substituting its own judgment for the judgment of the Commission concerning the question of whether or not the transportation services performed by the petitioners in and in connection with the transportation of said Arbuckle Brothers' shipments, as compared with the transportation services performed by the petitioners in and in connection with the transportation of said Federal Sugar Refining Company shipments, are like and contemporaneous.

Tenth. The court erred in substituting its own judgment for the judgment of the Commission concerning the question of whether or not the services performed by the petitioners in and in connection with the transportation of said Arbuckle Brothers' shipments, as compared with the services performed by the petitioners in and in connection with the transportation of said Federal Sugar Refining Company shipments, are performed by petitioners under substantially similar circumstances and conditions.

Eleventh. The court erred in substituting its own judgment for the judgment of the Commission concerning the character of the discrimination and preference and prejudice aforesaid.

Twelfth. The court erred in making the order granting the temporary injunction for the following reasons:

(*a*) The court did not, in accordance with section 3 of the Commerce Court act of June 18, 1910, state that irreparable damage to said petitioners, or to one or more of them, would result if the order were not made and such injunction granted.

260 (*b*) The court did not, in accordance with said section 3, include in said order a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result if the order were not made and such injunction granted.

(*c*) The court did not, in accordance with said section 3, specify in said order the nature of such damage.

Wherefore, these respondents pray that said decree be reversed.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.
ERNEST A. BIGELOW,
Solicitor for Federal Sugar Refining Company.

261 And afterwards, to-wit, on the 13th day of June, 1911, there was filed in the clerk's office of said court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order allowing appeal of Interstate Commerce Commission and Federal Sugar Refining Company.

262 In the United States Commerce Court.

(In equity, No. 38.)

THE BALTIMORE & OHIO RAILROAD Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and The Pennsylvania Railroad Company, petitioners, and William A. Jamison, John Arbuckle, and Brooklyn Eastern District Terminal, intervening petitioners, *v.* THE UNITED STATES, RESPONDENT, and Interstate Commerce Commission and Federal Sugar Refining Company, intervening respondents.	May session, 1911.

Order allowing appeal.

In this cause the Interstate Commerce Commission, one of the intervening respondents, by its solicitor, P. J. Farrell, and the Federal Sugar Refining Company, another of the intervening respondents, by its solicitor, Ernest A. Bigelow, having made their application in writing for an appeal from the decree therein rendered on the 22d day of May, 1911, to the Supreme Court of the United States, it is therefore ordered that said appeal be, and the same is hereby, granted and made returnable on the 13th day of July, , 1911.

[Seal of the United States Commerce Court.]

MARTIN A. KNAPP,
Presiding Judge.

263 And afterwards, to wit, on the 16th day of June, 1911, came the respondent the United States, by its Attorney General, and filed in the clerk's office of said court, in said entitled cause, its certain petition for appeal, in the words and figures following, to wit:

Petition for appeal by United States.

264 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario and Western Railway Company; and The Pennsylvania Railroad Company, petitioners; John Arbuckle and William A. Jamison; and Brooklyn Eastern District Terminal, intervening petitioners, *v.* THE UNITED STATES.	May session, 1911. No. 38.

Petition for appeal by the United States.

The United States of America, feeling itself aggrieved by the interlocutory order or decree of the Commerce Court, entered May 22, 1911, granting an injunction restraining the enforcement of the order of the Interstate Commerce Commission until the further order of the court, by George W. Wickersham, its Attorney General, prays an appeal to the Supreme Court of the United States, in accordance with section 2 of an act entitled "An act to create a commerce court," etc., approved June 18, 1910.

The particulars wherein the United States considers said order or decree erroneous are set forth in the assignment of errors herewith filed, to which reference is made.

And the United States further prays that a transcript of the record, proceedings, and papers on which the order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

Washington, June 16, 1911.

[Seal of the United States Commerce Court.]

GEORGE W. WICKERSHAM,
Attorney General of the United States.

Allowed.

MARTIN A. KNAPP,
United States Circuit Judge, and Presiding Judge of the United States Commerce Court in said cause.

265 And on the same day, to wit, the 16th day of June, 1911, came the respondent the United States, by its Attorney General, and filed in the clerk's office of said court, in said entitled cause, its certain assignment of errors, in the words and figures following, to wit:

Assignment of errors by United States.

266 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario and Western Railway Company; and The Pennsylvania Railroad Company, petitioners; John Arbuckle and William A. Jamison, and Brooklyn Eastern District Terminal, intervening petitioners, *v.* THE UNITED STATES.	May session, 1911. No. 38.

Assignment of errors by the United States.

Comes now the United States of America, by George W. Wickersham, its Attorney General, and in connection with its application for appeal files the following assignment of errors on which it will rely upon said appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court entered May 22, 1911, in the above-entitled cause.

The Commerce Court erred—

I. In granting the temporary injunction, enjoining the order of the Interstate Commerce Commission and in suspending the force and effect of the same, for that neither the petition of the petitioners, Baltimore and Ohio Railroad Company et al., nor the separate intervening petition of the intervening petitioners, Arbuckle and Jamison, nor the separate intervening petition of the intervening petitioner, Brooklyn Eastern District Terminal, (*a*) sets forth any cause of action, and each is insufficient to warrant the granting of the
267 temporary injunction, or to form the basis for any relief; (*b*) nor has either or any of them shown that there is any equity in the said petition, or in either of the said intervening petitions, upon which to grant the temporary injunction, or to form the basis for any relief; (*c*) nor has either or any of them shown that in making its said order the Interstate Commerce Commission acted

beyond its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (*d*) nor has either or any of them shown that in making its said order the Interstate Commerce Commission violated any right of the said petitioners, or the said intervening petitioners, or either of them, protected by the Constitution of the United States,, or any other right of the said petitioner, or the said intervening petitioners, over which this court may exercise jurisdiction.

II. In entering an order which is void for uncertainty, in that it does not specify whether the temporary injunction is granted upon the separate petition and motion of the petitioners, Baltimore and Ohio Railroad Company et al., for a preliminary injunction suspending the force and effect of the order of the Interstate Commerce Commission; or upon the separate intervening petition and motion of the intervening petitioners, Arbuckle and Jamison; or upon the separate intervening petition and motion of the intervening petitioner, Brooklyn Eastern District Terminal.

268 III. In not making a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the petitioners, Baltimore and Ohio Railroad Company et al., or to the intervening petitioners, Arbuckle and Jamison, or to the intervening petitioner, Brooklyn Eastern District Terminal, or to all of them, and so stating in said interlocutory order or decree, and further specifying the nature of the damage, in accordance with section 3 of an act entitled "An act to create a Commerce Court," etc., etc., approved June 18, 1910.

IV. In granting the temporary injunction enjoining the order of the Interstate Commerce Commission and in suspending the force and effect of the same, for that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with its decision, order, or requirement in the premises, said Interstate Commerce Commission found that in paying the allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowances to Federal Sugar Refining Company on its sugar, the petitioners unduly discriminate against said Federal Sugar Refining Company and unduly prefer the said Arbuckle Brothers, in violation of the act to regulate commerce; all of which were matters and things within the power of that body to hear and determine, and its report and order in the premises are conclusive upon the court, and the matters and things alleged in the petition and in the intervening petitions are insufficient to form the basis for a temporary injunction, or for any relief.

269 V. In granting the temporary injunction enjoining the order of the Interstate Commerce Commission and in suspending the force and effect of the same, for that in its report in writing in respect to the things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with its de-

cision, order, or requirement in the premises, said Interstate Commerce Commission found that the terms under which the petitioners accept the sugar of Arbuckle Brothers at their regular stations west of the river result in inequalities, preferences, and discriminations, and are unduly and unjustly prejudicial to the rights of the Federal Sugar Refining Company as a shipper of sugar over the lines of the petitioners in competition with Arbuckle Brothers in the same markets, in violation of the act to regulate commerce; all of which were matters and things within the power of that body to hear and determine, and its report and order in the premises are conclusive upon the court, and the matters and things alleged in the said petition and in each of the said intervening petitions are insufficient to form the basis for a temporary injunction, or for any relief.

VI. In granting the temporary injunction enjoining the order of the Interstate Commerce Commission and in suspending the force and effect of the same, for that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with
270 its decision, order, or requirement in the premises, said Interstate Commerce Commission found that the transportation of the sugar of Arbuckle Brothers and the transportation of the sugar of Federal Sugar Refining Company in fact commenced at the termini of the said petitioners on the Jersey shore, and that the actual contractual relation between the said two shippers and the said petitioners for the transportation and the liability of the said petitioners as common carriers did not commence previous to the time the sugar of each shipper was delivered to the said petitioners at that point; and that in paying the allowances to Arbuckle Brothers, while at the same time paying no such allowances to Federal Sugar Refining Company, the petitioners unduly discriminated against said Federal Sugar Refining Company and unduly prefer the said Arbuckle Brothers, in violation of the act to regulate commerce; all of which were matters and things within the power of that body to hear and determine, and its report and order in the premises are conclusive upon the court, and the matters and things alleged in the petition and in each of the said intervening petitions are insufficient to form the basis for a temporary injunction, or for any relief.

VII. In granting the temporary injunction enjoining the order of the Interstate Commerce Commission and in suspending the force and effect of the same, for that the said order is not open to
271 attack in the courts because the Interstate Commerce Commission in making and entering the said order kept within the powers conferred upon it by the statute.

VIII. In holding that the intervening petitioner, Brooklyn Eastern District Terminal, was a party in interest to the proceeding before the Interstate Commerce Commission; and that it has such an interest in this proceeding as is contemplated by the statute in such case made and provided to entitle it to intervene and be heard herein;

and in considering the alleged interest of the said Brooklyn Eastern District Terminal in granting the temporary injunction.

IX. In not sustaining, for the foregoing reasons, the motion of the United States to dismiss the said petition and the said intervening petitions, and each of them.

Wherefore the United States prays that the said interlocutory order or decree of the Commerce Court, entered May 22, 1911, be reversed, annulled, and set aside, and that the said petition and the said intervening petitions, and each of them, be dismissed, and for such other and further order as may be appropriate.

Washington, June 16, 1911.

GEO. W. WICKERSHAM,
Attorney General of the United States.

272 And on the same day, to wit, the 16th day of June, 1911, there was filed in the clerk's office of said court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order allowing appeal of United States.

273 In the United States Commerce Court.

THE BALTIMORE & OHIO RAILROAD COMPANY; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario and Western Railway Company; and The Pennsylvania Railroad Company, petitioners; John Arbuckle and William A. Jamison, and Brooklyn Eastern District Terminal, intervening petitioners, *v.* THE UNITED STATES.	May session, 1911. No. 38.

Order allowing appeal to the United States.

Be it remembered that in the above-entitled cause, on this 16th day of June, 1911, the United States of America, by George W. Wickersham, its Attorney General, having made and filed its petition praying an appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court entered May 22, 1911, and having at the same time made and filed its assignment of errors, and having in all respects conformed to the statute and the rules of court in such case made and provided:

It is ordered and decreed that the said appeal be, and the same is hereby, allowed, as prayed; and the clerk is directed to transmit

forthwith a properly authenticated transcript of the record, papers, and proceedings to the Supreme Court of the United States.

Washington, June 16, 1911.

MARTIN A. KNAPP,
United States Circuit Judge and Presiding Judge of the United States Commerce Court in said cause.

[Seal of the United States Commerce Court.]

274 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.,
v.
UNITED STATES.
} No. 38.

To the Clerk of Said Court:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the clerk of the Supreme Court of the United States, upon the appeal of the United States, and the appeal of the Interstate Commerce Commission and Federal Sugar Refining Company, intervening respondents, and include in said transcript the following pleadings, proceedings, and papers on file or of record, to wit:

Petition for injunction, filed April 12, 1911.

Notices filed in the Department of Justice and in the office of the secretary of the Interstate Commerce Commission, with return of filing.

Petition of Federal Sugar Refining Company to be made a party respondent, filed April 19, and order granting the same.

Appearance of P. J. Farrell, solicitor for Interstate Commerce Commission, filed May 8, 1911.

Petitioners' notice of motion for preliminary injunction and affidavits, filed May 10, 1911.

Motion of Interstate Commerce Commission and Federal Sugar Refining Company to dismiss, filed May 11, 1911.

Notice of motion to intervene and notice of motion for preliminary injunction of Brooklyn Eastern District Terminal, filed May 11, 1911.

Affidavit of service by Brooklyn Eastern District Terminal, filed May 12, 1911.

275 Notice of motion to intervene and notice of motion for preliminary injunction of John Arbuckle and William A. Jamison, filed May 12, 1911.

Motion of United States to dismiss, filed May 12, 1911.

Order granting Brooklyn Eastern District Terminal leave to intervene, entered May 17, 1911.

Order granting John Arbuckle and William A. Jamison leave to intervene, entered May 17, 1911.

Order extending motions of the United States and the Interstate Commerce Commission and Federal Sugar Refining Company to

dismiss the petition to cover the two intervening petitions, entered May 17, 1911.

Order excluding evidence taken before Interstate Commerce Commission, entered May 17, 1911.

Order denying motions to dismiss, entered May 22, 1911.

Order granting motion for temporary injunction, entered May 22, 1911.

Service of order granting temporary injunction on chairman of Interstate Commerce Commission, May 23, 1911.

Service of order granting temporary injunction on the Attorney General of the United States, May 25, 1911.

Petition for appeal and assignment of errors of Interstate Commerce Commission and Federal Sugar Refining Company, filed June 12, 1911.

Order allowing appeal and citation on appeal of Interstate Commerce Commission and Federal Sugar Refining Company, filed June 13, 1911.

Citation on appeal of Interstate Commerce Commission and Federal Sugar Refining Company and service thereof on each petitioner and intervening petitioner.

Petition for appeal, assignment of errors, order allowing appeal, and citation on appeal of the United States, June 16, 1911.

Certified copy of citation on appeal of the United States and service thereof on each petitioner and each intervening petitioner.

June 26, 1911.

BLACKBURN ESTERLINE,
For the United States.
P. J. FARRELL,
For the Interstate Commerce Commission.
ERNEST A. BIGELOW,
For the Federal Sugar Refining Company.

276 In the United States Commerce Court.

THE BALTIMORE & OHIO RAILROAD COMPANY; THE CENTRAL Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and The Pennsylvania Railroad Company, petitioners, and John Arbuckle and William A. Jamison and Brooklyn Eastern District Terminal, intervening petitioners, *vs.* UNITED STATES, RESPONDENT, AND INTERSTATE COMMERCE Commission and Federal Sugar Refining Company, intervening respondents.	No. 38.

DISTRICT OF COLUMBIA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 275,

inclusive) to be a true and complete transcript of the proceedings had of record in the above entitled cause, made in accordance with the præcipe filed in the clerk's office of said court on the 26th day of June, A. D. 1911, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 12th day of July, A. D. 1911.

G. F. SNYDER,
Clerk.

[SEAL.]

277 In the United States Commerce Court.

(In equity, No. 38.)

THE BALTIMORE & OHIO RAILROAD COMPANY; The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and The Pennsylvania Railroad Company, petitioners; and William A. Jamison, John Arbuckle, and Brooklyn Eastern District Terminal, intervening petitioners,

v.

THE UNITED STATES, RESPONDENT, AND INTERSTATE Commerce Commission and Federal Sugar Refining Company, intervening respondents.

May session. 1911.

Citation on appeal.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Baltimore & Ohio Railroad Company; the Central Railroad Company of New Jersey; the Delaware, Lackawanna & Western Railroad Company; the Erie Railroad Company; the Lehigh Valley Railroad Company; the New York, Ontario & Western Railway Company; the Pennsylvania Railroad Company; William A. Jamison, John Arbuckle, and the Brooklyn Eastern District Terminal, or Hugh L. Bond, Jackson E. Reynolds, W. S. Jenney, George F. Brownell, J. F. Schaperkotter, John B. Kerr, George Stuart Patterson, William N. Dykman, and Henry B. Closson, their solicitors of record, greeting:

You are hereby cited and admonished to be and appear be-
278 fore the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to

the appeal sued out and filed in the clerk's office in the United States Commerce Court, in the cause wherein the United States is respondent and the Interstate Commerce Commission and the Federal Sugar Refining Company are intervening respondents, and said The Baltimore & Ohio Railroad Company; the Central Railroad Company of New Jersey; the Delaware, Lackawanna & Western Railroad Company; the Erie Railroad Company; the Lehigh Valley Railroad Company; the New York, Ontario & Western Railway Company; and the Pennsylvania Railroad Company are petitioners, and William A. Jamison, John Arbuckle, and the Brooklyn Eastern District Terminal are intervening petitioners, to show cause, if any there be, why the decree rendered against the United States, the Interstate Commerce Commission, and the Federal Sugar Refining Company, aforesaid, as in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness, the Honorable Martin A. Knapp , United States Commerce Court Judge, this the 13th day of June, in the year of our Lord, one thousand nine hundred and eleven.

[SEAL.]

MARTIN A. KNAPP,
Presiding Judge.

279 Certified copy of foregoing citation on appeal served upon Geo. E. Hamilton, 916 Union Trust, the designated agent of the Baltimore & Ohio Railroad Company, at Washington, this 15th day of June, 1911.

P. J. STAREK, *Marshal.*

Accepted by:

LOUISE F. DYER.

Certified copy of foregoing citation on appeal served upon L. T. Michener, Pacific Bldg., the designated agent of the Central Railroad Company of New Jersey, at Washington, this 15th day of June, 1911.

P. J. STAREK, *Marshal.*

Accepted by:

L. T. MICHENER.

Certified copy of foregoing citation on appeal served upon C. N. Osgood, 606 Colorado Bldg., the designated agent of the Delaware, Lackawana & Western Railroad Company, at Washington, this 15th day of June, 1911.

P. J. STAREK, *Marshal.*

Accepted by:

J. H. HINWOOD (for C. N. OSGOOD).

Certified copy of foregoing citation on appeal served upon S. C. Wood, Colorado Bldg., the designated agent of the Erie Railroad Company, at Washington, this 15th day of June, 1911.

P. J. STAREK, *Marshal.*

Accepted by:

GEO. H. POSKE (for S. C. WOOD).

280 Certified copy of foregoing citation on appeal served upon C. N. Osgood, 606 Colorado Bldg., the designated agent of the Lehigh Valley Railroad Company, at Washington, this 15th day of June, 1911.

P. J. Starek, *Marshal.*

Accepted by:

J. H. Hinwood (for C. N. Osgood).

Certified copy of foregoing citation on appeal served upon Morris F. Frey, 711 Nat. Met. Bank Bldg., the designated agent of the New York, Ontario & Western Railway Company, at Washington, this 15th day of June, 1911.

P. J. Starek, *Marshal.*

Accepted by:

Morris F. Frey.

Certified copy of foregoing citation on appeal served upon F. D. McKenney, Hibbs Bldg., the designated agent of the Pennsylvania Railroad Company, at Washington, this 15th day of June, 1911.

P. J. Starek, *Marshal.*

Accepted by:

F. D. McKenney.

Certified copy of foregoing citation on appeal sent to U. S. Marshal C. J. Haubert, eastern district, Brooklyn, N. Y., for service upon the designated agent of John Arbuckle and William A. Jamison, composing the Jay Street Terminal, this 15th day of June, 1911. Further notice later.

P. J. Starek, *Marshal.*

June 21, 1911. Notice received from Marshal Haubert that above citation was served on June 16, 1911, on I. R. T. Hart, manager of the Jay Street Terminal.

Marshal.

Certified copy of foregoing citation on appeal sent to U. S. Marshal C. J. Haubert, eastern district, Brooklyn, N. Y., for service upon the designated agent of the Brooklyn Eastern District Terminal, this 15th day of June, 1911. Further notice later.

P. J. Starek, *Marshal.*

June 21, 1911. Notice received from Marshal Haubert that above citation was served on June 16, 1911, on R. F. Wilson, chief clerk of the Brooklyn Eastern Terminal.

P. J. Starek, *Marshal.*

281 Department of Justice. Office of United States marshal, Eastern District of New York. United States Court House and Post Office Building.

Marshal's return.

BROOKLYN, N. Y., *July 11, 1911.*

Baltimore & Ohio R. R. Co. vs. U. S.

The citation of the Interstate Commerce Commission was served on William A. Jamison and John Arbuckle on the 5th day of July, 1911, by leaving with Fred Tillier, the general supt. of the Jay Street Terminal, a copy for each.

CHARLES J. HAUBERT,
U. S. Marshal, Eastern District of New York.

A copy of the above citation was served on R. F. Wilson, chief clerk of Brooklyn Eastern District Terminal, on the 16th day of June, 1911.

CHARLES J. HAUBERT,
U. S. Marshal, Eastern District of New York.

282 UNITED STATES OF AMERICA, *ss:*

To the Baltimore and Ohio Railroad Company; the Central Railroad Company of New Jersey; the Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario and Western Railway Company; the Pennsylvania Railroad Company, petitioners; John Arbuckle and William A. Jamison; and Brooklyn Eastern District Terminal, intervening petitioners, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal allowed and filed in the clerk's office of the United States Commerce Court, Washington, D. C., wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the order or decree of the United States Commerce Court against the said United States as in the said petition of appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Martin A. Knapp, United States circuit judge and presiding judge of the United States Commerce Court in said cause, this 16th day of June, A. D. 1911.

[SEAL.] MARTIN A. KNAPP,
United States Circuit Judge and Presiding Judge of the United States Commerce Court in said Cause.

Attest:

G. F. SNYDER,
Clerk, U. S. Commerce Court.

Filed June 16, 1911. United States Commerce Court.

G. F. SNYDER, *Clerk.*

283 Certified copy of foregoing citation on appeal served upon Geo. E. Hamilton, 916 Union Trust, the designated agent of the Baltimore and Ohio Railroad Company, at Washington, this 19th day of June, 1911, by leaving same at his office.

F. J. STAREK, *Marshal.*

Accepted by:

LOUISE F. DYER,
(for George E. Hamilton).

Certified copy of foregoing citation on appeal served upon L. T. Michener, Pacific Building, the designated agent of the Central Railroad Company of New Jersey, at Washington, this 17th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by:

L. T. MICHENER.

Certified copy of foregoing citation on appeal served upon C. N. Osgood, Colorado Building, 606, the designated agent of the Delaware, Lackawanna and Western Railroad Company, at Washington, this 19th day of June, 1911, by leaving same at his office.

F. J. STAREK, *Marshal.*

Accepted by:

J. H. HINWOOD,
(for C. N. Osgood).

Certified copy of foregoing citation on appeal served upon S. C. Wood, Colorado Bldg., 501, the designated agent of the Erie Railroad Company, at Washington, this 17th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by:

S. C. WOOD.

284 Certified copy of foregoing citation on appeal served upon C. N. Osgood, 606 Colorado Bldg., the designated agent of the Lehigh Valley Railroad Company, at Washington, this 19th day of June, 1911, by leaving same at his office.

F. J. STAREK, *Marshal.*

Accepted by:

J. H. HINWOOD,
(for C. N. Osgood).

Certified copy of foregoing citation on appeal served upon Morris F. Frey, 711 Nat. Met. Bank Bldg., the designated agent of the New

York, Ontario and Western Railway Company, at Washington, this 17th day of June, 1911, by leaving same at his office.

F. J. STAREK, *Marshal.*

Accepted by:

R. L. BLAINE.

Certified copy of foregoing citation on appeal served upon F. D. McKenney, Hibbs Bldg., the designated agent of the Pennsylvania Railroad Company at Washington, this 17th day of June, 1911.

P. J. STAREK, *Marshal.*

Accepted by:

F. D. MCKENNEY.

285 UNITED STATES OF AMERICA,
District of Columbia, ss:

Before me, the undersigned, the clerk of the United States Commerce Court, personally appeared Blackburn Esterline, who, being by me first duly sworn, makes oath and says that on the 27th day of June, A. D. 1911, at 10.45 a. m., of said day, in the city of Washington, District of Columbia, he delivered a true copy of the within citation to William N. Dykman, Esq., the solicitor of record for John Arbuckle and William A Jamison, intervening petitioners in the case of Baltimore and Ohio Railroad Company et al. *v.* United States, No. 38, United States Commerce Court.

BLACKBURN ESTERLINE.

Subscribed and sworn to before me the 27th day of June, A. D. 1911.

[SEAL.] G. F. SNYDER,
Clerk, U. S. Commerce Court.

286 (Copy.)

UNITED STATES OF AMERICA, *ss:*

To The Baltimore and Ohio Railroad Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario and Western Railway Company; The Pennsylvania Railroad Company, petitioners; John Arbuckle and William A. Jamison and Brooklyn Eastern District Terminal, intervening petitioners, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal allowed and filed

in the clerk's office of the United States Commerce Court, Washington, D. C., wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the order or decree of the United States Commerce Court against the said United States as in the said petition of appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin A. Knapp, United States circuit judge and presiding judge of the United States Commerce Court in said cause, this 16th day of June, A. D. 1911.

[SEAL.]

MARTIN A. KNAPP,
United States Circuit Judge and Presiding Judge of the United States Commerce Court in said cause.

Attest:

G. F. SNYDER,
Clerk U. S. Commerce Court.

A true copy.
Test:

G. F. SNYDER,
Clerk of the United States Commerce Court.

[SEAL.]

287 STATE OF NEW YORK,
County of Kings, ss:

Before me, the undersigned, Joseph G. Cochran, personally appeared James E. McEvoy, who, being by me first duly sworn, makes oath and says that on the 19th day of June, A. D. 1911, at 9.45 a. m. of said day, at the main office of the Jay Street Terminal, No. — foot of Jay St., city of New York, borough of Brooklyn, State of New York, he delivered a true copy of the citation, of which the annexed is a true copy, to I. R. T. Hart, personally, the manager for John Arbuckle and William A. Jamison, intervening petitioners, in the case of Baltimore and Ohio Railroad Company et al. *v.* United States No. 38, United States Commerce Court.

JAMES E. MCEVOY,
Deputy U. S. Marshal, Eastern District of New York.

Subscribed and sworn to before me the 28th day of June, A. D. 1911.

[SEAL.]

J. G. COCHRAN,
U. S. Commissioner, E. D. of New York.

288 STATE OF NEW YORK,
County of Kings, ss:

Before me, the undersigned, Joseph G. Cochran, personally appeared James E. McEvoy, who, being by me first duly sworn, makes oath and says that on the 19th day of June, A. D. 1911, at 10.30 a. m. of said day, at the office of Brooklyn Eastern District Terminal, No. 186 Kent Avenue, city of New York, borough of Brooklyn, State of

New York, he delivered a true copy of the citation, of which the annexed is a true copy, to Mr. Carberry, the manager of Brooklyn Eastern District Terminal, a corporation, and intervening petitioner, in the case of Baltimore and Ohio Railroad Company et al. *v.* United States, No. 38, United States Commerce Court.

JAMES E. MCEVOY,
Deputy U. S. Marshal, Eastern District of New York.

Subscribed and sworn to before me the 28th day of June, A. D. 1911.

[SEAL.] J. G. COCHRAN,
U. S. Commissioner, E. D. of New York.

289 STATE OF NEW YORK,
County of New York, ss:

Before me, the undersigned, Frederick L. Campbell, a notary public in and for the county of New York, personally appeared Joseph Leibowitz, who being by me first duly sworn, makes oath and says, that on the 28th day of June, A. D. 1911, at 11.00 a. m. of said day, at No. 52 William Street, in the borough of Manhattan, city of New York, State of New York, he served the within citation upon Henry B. Closson, Esq., the solicitor of record for the Brooklyn Eastern District Terminal, intervening petitioner, in the case of Baltimore and Ohio Railroad Company et al. *vs.* United States, No. 38, United States Commerce Court, by delivering to and leaving with Lloyd L. Osborn, the managing clerk in charge of the office of said Henry B. Closson, a true copy thereof.

JOSEPH LEIBOWITZ.

[1] Subscribed and sworn to before me the 28th day of June, A. D. 1911.

[SEAL.] FREDERICK L. CAMPBELL.
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

290 STATE OF NEW YORK,
County of New York, ss:

Before me, the undersigned, Frederick L. Campbell, a notary public in and for the county of New York, personally appeared Joseph Leibowitz, who being by me first duly sworn, makes oath and says, that on the 28th day of June, A. D. 1911, at 11.30 a. m. of said day, at No. 50 Church Street, borough of Manhattan, city of New York, State of New York, he served the within citation upon George F. Brownell, Esq., the solicitor of record for all petitioners in the case of Baltimore and Ohio Railroad Company et al. vs. United States, No. 38, United States Commerce Court, by delivering to and leaving with

[1] Jurat struck through in original.

David Bosman, the person in charge of the office of said solicitor, a true copy thereof.

JOSEPH LEIBOWITZ.

[1] Subscribed and sworn to before me the 28th day of June, A. D. 1911.

[SEAL.] FREDERICK L. CAMPBELL.
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Indorsed on cover:) File No. 22798, United States Commerce Court. Term No., 722. The United States, The Interstate Commerce Commission, and The Federal Sugar Refining Company, appellants, vs. The Baltimore & Ohio Railroad Company, The Central Railroad Company of New Jersey, et al. Filed July 14th, 1911. File No. 22798.

---

[1] Jurat struck through in original.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, THE INTERSTATE Commerce Commission, and the Federal Sugar Refining Company, appellants, *v.* THE BALTIMORE AND OHIO RAILROAD Company; The Central Railroad Company of New Jersey, et al.	No. 722.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and moves the court to advance the above-entitled cause for hearing at this term.

The appeal is from an interlocutory order or decree of the Commerce Court granting a preliminary injunction against enforcement of an order of the Interstate Commerce Commission.

The following questions, among others, are involved:

1. Whether the issue of the temporary injunction was proper.

16734—11

2. Whether the court should have enjoined the enforcement of the order of the commission founded upon a determination by the commission that the operation by Arbuckle Bros. of a dock in Brooklyn as a terminal for the railroads did not justify the railroads in giving to said Arbuckle Bros. an allowance for lightering their sugar to the defendant's regular stations on the Jersey shore, where no such allowances were made to them on sugar going to the same stations from the Federal Sugar Refining Co.

The priority suggested is authorized by section 2 of the act of June 18, 1910 (36 Stat. L., Pt. I, c. 309, p. 542).

I am authorized to state that all parties appellant concur in this motion and that the parties appellee have no opposition.

FREDERICK W. LEHMANN,
Solicitor General.

NOVEMBER, 1911.

○

15

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

In Equity.

No. 722.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, AND THE FEDERAL SUGAR REFINING COMPANY, APPELLANTS,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, THE INTERSTATE Commerce Commission, and the Federal Sugar Refining Company, appellants, *v.* THE BALTIMORE & OHIO RAILROAD COMPANY, The Central Railroad Company of New Jersey, et al., appellees.	In Equity, No. 722.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This case comes here by appeal from an interlocutory decree of the Commerce Court, enjoining enforcement of an order of the Interstate Commerce Commission dated December 5, 1910, the body of which reads:

> This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission

having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof, and having found that the allowances paid by the above-named defendants to Arbuckle Brothers on their sugar brought by them on floats from [or on] lighters to the regular terminals of defendants on the Jersey shore in the State of New Jersey, while at the same time paying no such allowances to complainant on its sugar brought by it on lighters to the defendants' said regular terminals on the Jersey shore, unduly discriminate against said complaints [complainants] and unduly prefer said Arbuckle Brothers, in violation of the act to regulate commerce.

It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain, from paying such allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowances to said complainant on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce. (Rec. 67–68.)

The real question for determination, as we view this controversy, may be stated in a few words: May the carriers who transport freight traffic in a westerly direction from New York Harbor points, by entering

into an agreement with some of the largest shippers of sugar, which, in tonnage, constitutes about one-third of that traffic, ostensibly for the purpose of providing terminal facilities in Brooklyn for the accommodation of the general public, accord to such shippers rates which, in reality, when considered as a net proposition, are materially less than the rates contemporaneously exacted by the carriers from another shipper, in cases where, in each instance, the services performed by the carriers pertain to sugar shipped over the same lines of railway, in the same direction, and between the same points; that is to say, may the carriers give to Arbuckle Brothers rates which are less in each instance than the rates they contemporaneously exact from the Federal Sugar Refining Company for the transportation of sugar over the carriers' lines of railway from the Jersey shore to western points of destination?

The order of the Commission was made under circumstances and conditions which may be stated as follows:

On or about October 1, 1909, the appellant, the Federal Sugar Refining Company of New York, instituted a proceeding before the Commission by filing in the Commission's office a complaint against the carriers who are appellees herein. Said proceeding is numbered 2888 on the Commission's docket. The complaint was, in substance, that the carriers were violating sections 1, 2, and 3 of the act to regulate commerce by paying on interstate shipments of sugar shipped over the carriers'

lines by Arbuckle Brothers, a firm composed of John Arbuckle and William A. Jamison, an allowance of 3 cents per 100 pounds where the shipments were destined to the carriers' western termini or points east thereof, and an allowance of 4½ cents per 100 pounds where the shipments were destined to points west of said western termini, and refusing to pay either like allowances or any allowances at all on similar shipments shipped over the carriers' lines by said complainant. (Rec., 38–40.)

After full hearing and investigation had and after the case had been fully argued by counsel for the parties the Commission made a report in which it said:

> Among the several corporations and copartnerships engaged in the refining of sugar in and about the harbor of New York City the only ones that we are concerned with at this time are the complainant and a copartnership widely known as Arbuckle Brothers, which owns an extensive property at the foot of Bridge Street in the city of Brooklyn having a frontage of 1,200 feet on East River and locally known among the shippers that use it as the Jay Street Terminal of the defendants. For that use of the dock and for their services in conducting it as a freight station and in floating and lightering shipments between the dock and the regular terminals of the defendants in Jersey City, Arbuckle Brothers receive from the defendants allowances ranging from 3 to 4½ cents per 100 pounds on all merchandise passing through the terminal, whether inbound or outbound. The floats and barges used in

this service are owned by Arbuckle Brothers and all persons employed in the handling of the freight, on the water as well as on the dock, are on the pay rolls of that firm.

The property immediately adjoining the dock property is also owned by Arbuckle Brothers, and on it they have erected a large sugar-refining plant. No less than one-third of all the merchandise handled through the dock by Arbuckle Brothers in their capacity, as is here contended, as agents of the defendants, is sugar manufactured and owned by Arbuckle Brothers in their capacity as refiners and shippers of sugar. As shippers Arbuckle Brothers daily deliver at the Jay Street Terminal a large tonnage of refined sugar for carriage to various interstate points of consumption. It is contended here that they receive their own sugar on their own dock as agents of the defendant carriers. In lighters or on floats, owned by them, but which, it is claimed, they operate as agents of the defendants, they carry their own sugar thence to the regular freight-receiving stations at the rail ends of the defendants on the Jersey shore. On every 100 pounds of sugar thus delivered at the Jay Street Terminal by Arbuckle Brothers, as shippers, to Arbuckle Brothers, as agents of the defendant carriers, and lightered by them in the latter capacity, as is contended, across the river to the defendants' depots, Arbuckle Brothers receive, as heretofore stated, an allowance of from 3 to 4½ cents. They receive similar allowances on the merchandise of other shippers handled through the Jay Street

Terminal in the same manner. It may be well here to add that the defendants assert that the Jay Street Dock was made a railroad terminal in order to provide a freight station for the shipments of manufacturers and merchants in Brooklyn who have no dock of their own. And it is true that a substantial tonnage, said to be about two-thirds of the total tonnage now passing through the terminal, is of that character.

The complainant, the Federal Sugar Refining Company, is also a refiner of sugar and competes with Arbuckle Brothers in supplying that commodity to consumers in the interstate communities reached by the defendants and their connections. Its refinery is located at Yonkers. Adjacent to and connected with it the complainant owns a pier or dock. Yonkers, however, is outside the lighterage limits established by the defendants in New York Bay and the two rivers, which together form what we have referred to as the harbor of New York; and the complainant therefore does not enjoy from its dock the benefit of the free-lighterage service offered by the defendants, under their tariffs, to shippers to and from piers that are within the limits. It is said that the complainant may reach the destinations in question, and in most instances at the same rates, by delivering its sugar to the New York Central at Yonkers, whence it can be carried to Sixtieth Street and floated across the harbor to the receiving stations of the defendants on the west side of North River. It is asserted, however, and this we take to be established of

record, that, for various reasons and because of delays in the handling of shipments, the complainant has found by actual experience that it can not successfully meet the requirements of its patrons by using that route, and it has been compelled to find other means for delivering its refined sugar to the defendants at Jersey City. It has therefore entered into an arrangement with the Ben Franklin Transportation Company for lightering its sugar to the same freight depots of the defendants west of the river to which Arbuckle Brothers lighter their sugar.

* * * * *

Since its incorporation in 1907 the complainant has maintained its general offices at 138 Front Street, in the city of New York, where all its accounts and records are kept, except such as pertain to the actual operation of the refinery at Yonkers. Here its president and other executive officers and their subordinates are located and the actual business of the company is conducted. The only employees at the refinery are those engaged in the operation of the plant, including the superintendent, the checkers, weighers, samplers, shipping clerks, etc. The books kept at the refinery are tally books, weighers' books, samplers' books, records of meltings, and similar documents and papers that pertain to the actual conduct of the refinery. The records of the financial operations of the company, the sales of its products, and all its general correspondence are kept at the general offices.

For fifteen years the Ben Franklin Transportation Company has been a lessee of a portion of Pier 24, in North River, at the foot of Franklin Street, the other portions of the pier being rented to other water lines. It is an independent company engaged in a general lighterage and towing business on the Hudson River. It seems not to be affiliated, either in fact or in origin, with the complainant and to have no intercorporate relations with it. One of its officers is said to own 10 shares of the common stock and 170 shares of the preferred stock of the complainant company. With that exception, which may be disregarded as having no significance, the only relation between the two enterprises rests on the contract between them, under which the transportation company undertakes to lighter the sugar of the complainant, first to Pier 24 and thence, as it may be directed, to the Jersey City terminals of the defendants and to receiving stations of other water and rail lines. This work is carried on by it substantially as follows:

A lighter reports every morning at the dock of the complainant at Yonkers and receives such sugar in barrels, boxes, or other packages as may be ready for shipment. The superintendent of the refinery, having been previously advised from the company's general offices in New York City of the quantity of sugar required in order to fill accepted contracts, has the sugar ready at the stringpiece, and it is loaded into the lighter by employees of the transportation company. The officer in charge of the lighter gives a receipt for the

shipment and in return is handed a document showing the complainant as the consignor at Yonkers and the consignee at 138 Front Street. It also gives the contract numbers, together with the weight and description of the packages. The lighter then proceeds with its load to Pier 24, which, as heretofore stated, is within the lighterage limits. It is there made fast to the dock, and notice of its arrival is given at the general offices of the complainant. Thereupon the complainant issues shipping instructions to the transportation company and hands to its representative a bill or bills of lading for execution by the defendant carriers upon the delivery of the sugar on the Jersey shore. Upon receiving these instructions and the bills of lading the lighter proceeds to the freight depots on the Jersey side and there makes delivery of its cargo by unloading the sugar upon the car platforms of the carrier or carriers named in the lading papers. The bills of lading are executed by the carriers and returned to the lighterman.

For its services in taking the sugar first to Pier 24 and then, after receiving instructions and the bills of lading, in carrying it across the river and making delivery at the rail ends of the defendant carriers, the Ben Franklin Transportation Company, under its contract with the complainant, demands and receives 3 cents per 100 pounds. As Arbuckle Brothers receive from the defendant carriers an allowance of from 3 to 4½ cents per 100 pounds upon delivering their sugar across the river at the same freight depots, the complainant contends

that the defendant carriers subject it to an unlawful discrimination when they decline to make it similar allowances for delivering its sugar to the defendants at the same place and in the same manner. That is the point of controversy to which our attention has been directed in both these proceedings. On the record in the former proceeding, as heretofore explained, it appeared that the lighterage movement commenced at Yonkers, which is outside the lighterage limits. On the record now before us the complainant contends that the lighterage movement to the receiving stations west of the river commences at Pier 24, where the complainant gives its shipping instructions to the lighterage company. Without entering here upon any discussion of the importance of the fact in the disposition of this proceeding, it will suffice to say that we accept the complainant's contention that the sugar is now being lightered to the defendants at Jersey City from Pier 24, which is inside the lighterage limits. The lighter is actually made fast to that pier when it arrives from Yonkers; sometimes a portion of its cargo is discharged there and held in storage, presumably for local use; the lighterman has no authority to go farther for any instructions for a further movement, and must wait there for authority and instructions; upon receiving orders he lighters the cargo as directed, sometimes to one station and sometimes to another, the cargo not infrequently being divided among the several receiving stations across the river, or being delivered to water lines or

railroads other than the defendants, all in accordance with the instructions received at Pier 24.

The one fact that stands out prominently upon this statement of the case is that it costs the complainant 3 cents per 100 pounds to tender its sugar to the defendants at their regular receiving stations on the Jersey shore, being the points where the actual rail transportation begins, while the defendants relieve Arbuckle Brothers of any such expense by paying them the ample allowances heretofore mentioned. Around this fact the whole controversy turns. As manufacturers and shippers of sugar, the complainant and Arbuckle Brothers are competitors in the markets reached by the defendants.

* * * In the past, as we know from various investigations and from an examination of old tariffs, Havemeyer & Elder, the predecessors of the American Sugar Refining Company, the dock of which is also involved in this proceeding, for many years enjoyed illegal preferences at the hands of the carriers. It is also our understanding that when Arbuckle Brothers began to compete with the Havemeyer refineries these allowances were extended to them, apparently under some sort of verbal arrangement. It was not until after the enactment of the so-called Elkins law that the lighterage allowances on sugar from the Arbuckle piers seem to have been published. They were then limited to sugar and coffee, being the commodities in which Arbuckle Brothers were interested; and they

were paid, as the tariff states, "on account of the peculiar physical situation at the water front adjacent to the Arbuckle refinery," a statement that has not been satisfactorily explained to the Commission, although commented upon at the hearing. The allowances at both piers seem, therefore, to have had their origin in an unlawful preference of these great shippers. Apparently it was not until some years afterwards that the two piers were made public receiving stations of the defendant carriers.

It is our observation that such arrangements are rarely entered into with small shippers, but usually only with shippers that are financially strong and control a large traffic. As is pointed out in the dissenting opinion in the first of these proceedings (17 I. C. C. Rep., at p. 51), an instance of this nature was developed in the investigation entitled "In the matter of allowances for transfer of sugar" (14 I. C. C. Rep., 619). It appeared in the course of that inquiry that the Pennsylvania Railroad Company has a wharf in Brooklyn immediately adjoining the Brooklyn Eastern District Terminal, a property of the Havemeyers, who were said to be closely affiliated with the American Sugar Refining Company. This dock will be considered later in this report. It will suffice at this point to say that in the investigation referred to the freight-traffic manager of the Pennsylvania Railroad Company frankly admitted that his company, notwithstanding the proximity of its own dock, had made the Brooklyn Eastern District

Terminal its terminal also, and in order to get a share of the sugar tonnage of the Havemeyer refinery had agreed to pay lighterage allowances on sugar shipped from that dock. Defining the transaction in the plainest terms, the Pennsylvania Railroad Company simply purchased its part of the traffic of that very extensive shipper; and in view of the allowances then being made by other carriers, it could get a portion of the tonnage in no other way. This matter, as well as the fact that the original allowances given to the Arbuckle Brothers were limited to sugar and coffee, the commodities in which they deal, are here recalled for the purpose of emphasizing what seems to be clearly established by the records of the Commission, namely, that the allowances were originally extended to these large shippers in order to put them on a preferred basis. It was not until after the regulating body had been strengthened by additional legislation that the two docks seem to have been designated in the published tariffs of the defendants as railway terminals and were thus made to subserve the convenience of such of the general shipping public in Brooklyn as might be able to use them.

* * * It is impossible to conclude on all the information before us that these continued relations between the defendant carriers and great shippers and interests closely allied and largely identified with great shippers are wholly disinterested, however much of a convenience the docks may now be to some of the general shipping public.

* * * The defendants decline to reimburse the complainant for the cost of delivering its sugar at the same receiving stations under substantially similar conditions. (Rec., 45–51.)

The complainant contends that in lightering their sugar to the Jersey shore and there delivering it to the defendants Arbuckle Brothers perform what the complainant refers to as a purely accessorial service. We incline to think this a sound view of the matter upon the facts shown of record. Neither the actual possession of their sugar nor their relation to it is in any respect changed until it is delivered into the physical possession of the defendants at Jersey City. This fact is clearly developed upon the record. Arbuckle Brothers handle the sugar out of their own refinery to their own dock and themselves deliver it to the defendants west of the river, using in the process only property and facilities that are owned by them and employees that are paid by them. Moreover, under the terms of the contracts between them and the defendant carriers none of the duties, obligations, responsibilities, or liabilities of common carriers attaches to the defendants with respect to the sugar of Arbuckle Brothers until the defendants have actually received it at their regular freight stations west of the river. Yet it is here contended that, through some sort of alchemy in their provisions, these contracts transmute Arbuckle Brothers from shippers into carriers' agents while they are in the act of delivering their own sugar to themselves at

their own dock. We are not necessarily controlled, however, by the face of those documents or by the merely superficial relation that they purport to establish between these shippers and the defendant carriers if, as seems to be abundantly clear upon a reading of their provisions, the real and actual relation of Arbuckle Brothers to the defendants, so far as their own sugar is concerned, is that of shippers up to the moment of time when they physically deliver their sugar to the defendants on the Jersey shore. The contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk, and only from that moment does the carrier's risk begin. It is only when the defendants actually accept and physically take possession of the sugar at their receiving stations west of the river that they agree to, and do in fact, assume the liabilities of common carriers with respect to the sugar of Arbuckle Brothers. (Rec., 53.)

* * * It is not necessary, however, to draw fine distinction between an accessorial service and a service of transportation as applied to the facts in this case. If the allowances made by the defendants subject the complainant to an undue discrimination, or give Arbuckle Brothers, their competitors, an unjust preference, a wrong is being done that must be redressed by an appropriate order, whether the allowances are paid as for an accessorial service or for a service of transportation. (Rec., 55.)

* * * And we find that the terms under which the defendant carriers accept the sugar of Arbuckle Brothers at their regular stations west of the river do result in inequalities, preferences, and discriminations, and are unduly and unjustly prejudicial to the rights of the complainant as a shipper of sugar over the lines of the defendants in competition with Arbuckle Brothers in the same markets. (Rec., 58.)

The sugar of the two competing shippers gets into the actual physical possession of the defendants on the Jersey shore under practically similar conditions, and if, as the defendants contend, the Arbuckle sugar commences to move at the Arbuckle Dock, it must be remembered that the defendants also contend that their transportation for the general public also extends to and commences at every other pier and dock within the lighterage limits that they have established. If, then, the defendants permit Arbuckle Brothers to furnish the lighterage facilities for their own sugar and perform the lighterage service across the river, and if this is to be regarded as a part of the transportation offered by the defendants under their tariffs, it is difficult to see upon what theory the defendants may defend their refusal to recognize the lighters hired by the complainant as its facilities in performing for the defendants a similar part of the transportation service. It seems to us very clear that the payment of allowances to one of these competing shippers, for a service of transportation alleged to be per-

formed by them for the defendants with their own facilities, creates a present actual and substantial inequality that is unlawful under the act when similar allowances are refused to the other and competing shipper for an exactly similar service. (Rec., 59.)

* * * We shall not undertake at this time to consider what rate question or other problem might be presented if the defendants should buy or lease and operate the Jay Street Terminal for themselves and perform the lighterage to and from that terminal with their own equipment and with their own employees. If the present allowances paid to Arbuckle Brothers are a fair measure of what it would really cost the defendants to put the Arbuckle sugar on the Jersey side with their own equipment, the question might arise as to the reasonableness, from the standpoint of these competing refineries, of having identical rates on sugar from both sides of the river. But no such question is before us at this time.

On the whole record we hold that when the complainant, as hereinbefore described, tenders its sugar to the defendants on lighters at their regular receiving stations on the Jersey shore it must be received and carried thence to destination on rates, terms, and conditions that are no less favorable to the complainant in any particular than the rates, terms, and conditions governing and surrounding the sugar traffic of Arbuckle Brothers brought by them on floats and lighters to the same stations for carriage to the same destination. (Rec., 60.)

In the month of May, 1907, the Federal Sugar Refining Company of Yonkers, predecessor of the Federal Sugar Refining Company, appellant herein, instituted a proceeding before the Commission by filing a complaint in the Commission's office against the carriers who are appellees herein, and in said complaint alleged that said complainant through the Ben Franklin Transportation Company performed the same service on its shipments of sugar as were performed by the American Sugar Refining Company through the Brooklyn Eastern District Terminal and by Arbuckle Brothers through the Jay Street Terminal; that the lighterage limits prescribed by said carriers were unduly discriminatory in that they did not extend to Yonkers and include the refinery of said complainant, and in that they permitted allowances to be made on shipments of sugar from the refineries of Arbuckle Brothers and the American Sugar Refining Company while not so permitting on the shipments of said complainant, and also alleged that said practice resulted in unjust discrimination and undue prejudice. Said proceeding is numbered 1082 on the Commission's docket.

After full hearing and investigation had the Commission dismissed by a four-to-three decision *without prejudice* said complaint, upon the ground that failure to include Yonkers within the lighterage limits did not constitute unjust discrimination. In this connection the Commission, in the majority report, said:

> * * * All we hold is that by establishing a lighterage service in New York Harbor

defendants incurred no liability, under the act to regulate commerce, to extend that service to Yonkers or other near-by communities, for the obvious reason that defendants have made themselves carriers by their own lines to New York, but have not assumed, and can not be required by this Commission to assume, any such obligation in respect of Yonkers. (Rec., 30.)

Three members of the Commission dissented upon the ground that the matters complained of constituted an unjust preference and undue discrimination (Rec., 37), and one member of the Commission who joined in the majority report stated his reasons for doing so as follows:

> I agree fully with the views of the majority on the question of extending defendant's lighterage limits so as to include Yonkers. I agree also with the conclusion of the majority report to the effect that defendants should not be required to pay complainant for lightering its sugar to defendants' terminals in the lighterage limits. I base that view, however, upon the fact that complainant's factory is outside the lighterage limits, and that, therefore, no obligation rests upon the defendants to either go and get complainant's shipments or hire another to perform that service. In my opinion if the complainant were located within the lighterage limits the defendants could not lawfully permit complainant's competitors to lighter their sugar and receive pay for that service and refuse to permit complainant to lighter its sugar and receive the same compensation for that service.

> It is not enough to say that because the Jay Street Terminal as a whole yields small dividends Arbuckle, as the owner of the Jay Street Terminal, receives no profit from the lightering of Arbuckle's sugar. The whole plant might be run at a loss and still there might be an abnormal profit in the lightering of sugar. It is all a question of fact and of bookkeeping.
>
> I think, therefore, unjust discrimination would necessarily exist if defendants permitted one sugar shipper within the lighterage limits to lighter his sugar and receive pay for that service and refused the same privilege and compensation to another sugar shipper also located within the lighterage limits. It might be that one such shipper would make a profit out of such allowance and that another shipper would not, just as one may make more profit than the other from the manufacture of the sugar. That, however, is a question of business ability, management, or advantage which neither the carriers nor this Commission has any right to undertake to adjust or equalize. (Rec., 33–34.)

Aside from conclusions, the allegations of fact contained in the petition of the carriers (Rec., 2–10), and in the petitions of the intervening petitioners (Rec., 90–97, 106–114), are in substance, the same as the facts reported by the Commission as aforesaid, but the appellees deny the correctness of the Commission's conclusions of fact and of law. (Rec., 10–14, 97–98, 114–117.)

After the petition of the carriers was filed the appellants herein filed motions to dismiss same for in-

sufficiency in accordance with provision therefor made in section 1 of the Commerce Court act of June 18, 1910, and after John Arbuckle and William A. Jamison and the Brooklyn Eastern District Terminal filed intervening petitions and were granted permission to intervene, the motions to dismiss were, by order of the Commerce Court upon application, extended so as to cover the intervening petitions. (Rec., 122.)

The cause was heard by the Commerce Court upon motions of the petitioners and intervening petitioners for a temporary injunction, upon pleadings and affidavits filed in support of the motion, and upon said motions to dismiss. (Rec., 124–126.)

After the case was argued orally before the Commerce Court, that court entered the interlocutory decree from which an appeal was taken as aforesaid. The Commerce Court did not, however, deliver any opinion, either oral or written, nor did it refer to any evidence, or make any finding of fact or other statement tending to show wherein, in making the order, the Commission had exceeded its power. The assignment of errors of the Commission and the Federal Sugar Refining Company is therefore based upon the assumption that the Commerce Court held against the Commission on every issue of law and of fact made by the pleadings of the parties. Said assignment is as follows:

> 1. The court erred in not dismissing the petition for want of equity.
>
> 2. The court erred in granting the temporary injunction enjoining enforcement of the

order of the Commission for the following reasons:

(a) That said petitioners, including said intervening petitioners, have not, nor has any of them, in and by their said petitions, or any of them, shown that the legislative department of the Government of the United States is, or ever has been, without power to grant the authority exercised by the Commission in making said order.

(b) That said petitioners, including said intervening petitioners, have not, nor has any of them, in and by said petitions, or any of them, shown that said legislative department did not duly confer upon this Commission the authority exercised by this Commission in making said order.

(c) That said petitioners, including said intervening petitioners, have not, nor has any of them, in and by said petitions, or any of them, shown that the subject matter of said order is not within the jurisdiction conferred upon the Commission by said legislative department.

(d) That said petitioners, including said intervening petitioners, have not, nor has any of them, in and by said petitions, or any of them, shown that in making said order the Commission exercised authority in excess of the authority conferred upon it by said legislative department.

(e) That said petitioners, including said intervening petitioners, have not, nor has any of them, in and by said petitions, or any of them, shown that in making said order the

Commission exercised either unreasonably or unlawfully the authority or any of the authority conferred upon it by said legislative department.

(f) That said petitioners, including said intervening petitioners, have not, nor has any of them, in and by said petitions, or any of them, shown that in making said order the Commission violated any constitutional or other right of said petitioners, or of any of said petitioners, over which the Commerce Court exercised or may exercise jurisdiction.

3. The court erred in holding that the transportation and transportation services of the petitioners, relating to the shipments of sugar made by Arbuckle Brothers, do not begin at the respective termini of the petitioners on the Jersey shore.

4. The court erred in holding that the shipments of sugar delivered by the Federal Sugar Refining Company for transportation to the petitioners at the respective termini of the petitioners on the Jersey shore do not originate at Pier 24 in New York City.

5. The court erred in holding that the practice of the petitioners of paying allowances per one hundred pounds of three cents and four and one-fifth cents on said Arbuckle Brothers' shipments and refusing to pay either like allowances or any allowances on the said Federal Sugar Refining Company shipments does not constitute the discrimination and preference and prejudice prohibited by sections 2 and 3 of said act.

6. The court erred in holding that said discrimination can not be held to be unlawful in the absence of a showing that the allowances paid to Arbuckle Brothers are unreasonable in and of themselves.

7. The court erred in holding that it is proper to consider how and by whom the sugar transported is handled previous to the time when it is offered to the petitioners for transportation at their respective termini on the Jersey shore in determining whether or not said Arbuckle Brothers' shipments are transported by petitioners under circumstances and conditions which are substantially similar to the circumstances and conditions pertaining to the transportation by petitioners of said Federal Sugar Refining Company shipments.

8. The court erred in substituting its own judgment for the judgment of the Commission concerning the question of whether or not said Arbuckle Brothers' shipments as compared with said Federal Sugar Refining Company shipments are a like kind of traffic.

9. The court erred in substituting its own judgment for the judgment of the Commission concerning the question of whether or not the transportation services performed by the petitioners in and in connection with the transportation of said Arbuckle Brothers' shipments, as compared with the transportation services performed by the petitioners in and in connection with the transportation of said Federal Sugar Refining Company shipments, are like and contemporaneous.

10. The court erred in substituting its own judgment for the judgment of the Commission concerning the question of whether or not the services performed by the petitioners in and in connection with the transportation of said Arbuckle Brothers' shipments, as compared with the services performed by the petitioners in and in connection with the transportation of said Federal Sugar Refining Company shipments, are performed by petitioners under substantially similar circumstances and conditions.

11. The court erred in substituting its own judgment for the judgment of the Commission concerning the character of the discrimination and preference and prejudice aforesaid.

12. The court erred in making the order granting the temporary injunction for the following reasons:

(a) The court did not, in accordance with section 3 of the Commerce Court act of June 18, 1910, state that irreparable damage to said petitioners, or to one or more of them, would result if the order were not made and such injunction granted.

(b) The court did not, in accordance with said section 3, include in said order a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result if the order were not made and such injunction granted.

(c) The court did not, in accordance with said section 3, specify in said order the nature of such damage. (Rec., 128–130.)

POINTS.

I.

THE COURT ERRED IN NOT DISMISSING THE PETITIONS FOR WANT OF EQUITY.

The first seven assignments are general and are to the effect that there is no equity in the petitions.

Concerning the regularity of the proceedings before the Commission and the Commission's jurisdiction in the premises there is no controversy whatever. It is admitted, at least it is not denied, that the Commission had jurisdiction over the parties in the proceeding before it and over the subject matter of controversy in that proceeding, and it is not claimed either that the Commission failed to give a full hearing to the carriers named in the order here in question or that the order was not served upon the carriers in accordance with the provisions of the act to regulate commerce.

Under these circumstances the natural inquiry is, What question of importance was presented to the Commerce Court for determination? These appellants answered that question by filing motions to dismiss, upon the ground that the allegations contained in the petitions of the appellees did not constitute a cause of action or make a case which entitled the appellees to the relief or any of the relief asked for by them. When the petitions were filed in the Commerce Court the appellants believed that the matters set forth therein were not sufficient to justify

any interference by the court with the order of the Commission, but, because of matters which will be referred to briefly in detail, counsel for the appellees contended to the contrary, and the views of the latter were, apparently, believed to be correct and accepted and adopted by the Commerce Court.

The appellees say that the lighterage services performed within the free lighterage limits in New York Harbor are not accessorial to the services performed by the carriers in transporting the sugar from their rail termini on the Jersey shore to western points of destination, and while we do not regard this matter as of great importance we think the contention of the appellees is incorrect. The carriers have established one rate for the transportation by rail from the Jersey shore and another rate for the transportation by water and rail from the harbor points (Rec., 60), and while in amount the former rate is the same as the latter, the rate from the harbor points includes a service not included in the rate from the Jersey shore. In other words, while the latter rate includes only the service of transportation by rail from the Jersey shore, the rate applicable to the harbor points covers such rail transportation and in addition thereto another service which is described in the tariffs of the carriers as a free-lighterage service. The lighterage service is supplemental to or in addition to a service of transportation by rail and is therefore accessorial according to the definition of that word as given in Webster's Dictionary.

The carriers do not make a separate charge for the lighterage service when that service is performed by them, but under the law they would have a right to do so, and an increase in through rates from the harbor points to said western points, which resulted from establishing a separate charge for the lighterage service, would not in any way affect the rate from the Jersey shore to said points of destination.

In *Int. Com. Com.* v. *Stickney*, 215 U. S., 98, the matter involved was a terminal charge for the delivery of live stock at the Union Stock Yards in Chicago, and the charge included transportation of the live stock to the stock yards from points of intersection between the line of the Union Stock Yards and Transit Company and the lines of other carriers who transported the live stock to said points of intersection from points outside the State of Illinois. And in that case this court said that the terminal charge covered services in addition to and entirely separate and distinct from the transportation to said points of intersection; that the carriers had a right to establish a separate charge for such terminal services, and that where such separate charge was established it must be considered as applicable only to the services covered thereby as shown by the tariffs of the carriers published and filed according to law (id., 107).

To the same effect see *Southern Railway Company* v. *St. Louis Hay & Grain Company*, 214 U. S., 297, 301.

The carriers have published and filed tariffs wherein and whereby they have established a lighterage zone

in New York Harbor, which includes the Jay Street Terminal and the Brooklyn Eastern District Terminal, in Brooklyn, and Pier 24 in New York City, but does not include the city of Yonkers. (Rec., 3, 46.)

John Arbuckle and William A. Jamison, under the firm name of Arbuckle Brothers, manufacture sugar at their plant, which is located immediately adjacent to the Jay Street Terminal, and they ship the sugar through said terminal over the rail lines of said carriers from the termini of the carriers on the Jersey shore to western points of destination. The sugar is transported to said termini from said terminal by Arbuckle Brothers on their own floats and lighters, which are operated by their own employees.

The Federal Sugar Refining Company manufactures sugar at its plant, which is located at the city of Yonkers, and ships the sugar over the rail lines of the carriers from their said termini on the Jersey shore to said western points of destination. The sugar is transported from Yonkers by the Ben Franklin Transportation Company, on floats and lighters owned and operated by it, first, to said Pier 24, and afterwards to the carriers said termini on the Jersey shore; and for such transportation services the Ben Franklin Transportation Company is paid by the Federal Sugar Refining Company.

On each of the shipments made by Arbuckle Brothers as aforesaid the carriers pay an allowance of 3 cents per 100 pounds, where the destination of the shipment is a point at or east of the carriers' western termini, and of 4½ cents per 100 pounds, where the

destination of the shipment is a point west of said western termini, but they do not pay either like allowances or any allowances at all on the sugar shipped by the Federal Sugar Refining Company as aforesaid.

In consequence of this discrimination the net amount of transportation charges paid by Arbuckle Brothers to the carriers for the transportation of their sugar over the carriers' lines from the Jersey shore to said western points of destination is in each instance less per 100 pounds to the extent of the allowance paid than the net amount of transportation charges paid by the Federal Sugar Refining Company to the carriers for the transportation of its sugar over the same lines of railway in the same direction and between the same points of origin and destination.

Also, as a result of said discrimination, the Federal Sugar Refining Company, in competing with Arbuckle Brothers in the sale of sugar at said western points of destination, is, in each instance, handicapped to the full extent of the allowance paid to Arbuckle Brothers as aforesaid.

The language of section 2 of the act is:

> That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands,

> collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

And upon the facts above stated the Commission concluded that said discrimination was unjust and constituted a violation of the prohibitions contained in said section 2.

But it is said that the conclusions of the Commission are, as a matter of law, untenable, because: (a) In receiving their shipments of sugar at the Jay Street Terminal and in transporting them therefrom to the Jersey shore Arbuckle and Jamison operate under the name of Jay Street Terminal and as agents of the carriers, and issue bills of lading which render the carriers liable to the consignees named therein for any loss of or damage to the shipments which may occur after such receipt. (b) A very large portion of the sugar shipped by Arbuckle and Jamison is sold by them f. o. b. Brooklyn. (c) Allowances pertaining to the shipments of Arbuckle Brothers are paid in accordance with tariffs published and filed by the carriers and in accordance with contracts entered into by and between the carriers and the Jay Street Terminal, and cover the use of said terminal and all services connected with the receipt of said shipments as well as the transportation thereof from said termi-

nal to the Jersey shore. (d) The contracts are not confined to Arbuckle Brothers' shipments of sugar; they cover also other traffic shipped by and consigned to members of the general public other than Arbuckle Brothers and transported over the carriers' lines of railway, and the allowances paid by the carriers on Arbuckle Brothers' shipments of sugar are, with only a few exceptions, the same as the allowances paid by the carriers on other traffic shipped from and destined to the Jay Street Terminal and transported over the carriers' lines of railway. (e) Bills of lading issued by the carriers, which pertain to the Federal Sugar Refining Company's shipments of sugar, show that said shipments are received for transportation by the carriers on the Jersey shore. (f) The Federal Sugar Refining Company's shipments originate at Yonkers, and the practice of shipping therefrom to Pier 24 and afterwards reshipping from Pier 24 to the Jersey shore is indulged in for the purpose of showing delivery to the carriers on the Jersey shore of shipments which originate at a point within said free-lighterage limits. (g) The carriers are now and always have been ready and willing to accept the shipments of the Federal Sugar Refining Company at any point within said lighterage limits and lighter them therefrom to the Jersey shore at their own expense, as in and by the tariffs published and filed by them they have advertised to do.

It will thus be seen that the contention of the appellees is, not that the discrimination referred to does not in fact exist, but that it results from matters

which make the circumstances and conditions under which the shipments of Arbuckle Brothers are transported by the carriers substantially dissimilar from the circumstances and conditions under which the carriers transport the shipments of the Federal Sugar Refining Company.

It is admitted that John Arbuckle and William A. Jamison comprise the firm of Arbuckle Brothers, and in an affidavit filed in support of the motion for a temporary injunction (Rec., 76), it is shown that they are the only members of the firm styled Jay Street Terminal. Also, as stated above, the Commission found that the floats and barges used in transporting the shipments of Arbuckle Brothers from the Jay Street Terminal to the Jersey shore are owned by that firm, and that all persons employed in handling the shipments, on the water as well as at the Jay Street Terminal, are on the pay rolls of Arbuckle Brothers (Rec., 45), and it will be observed that the correctness of those findings is not denied by the appellees. We therefore think pointing out that Arbuckle and Jamison manufacture and ship sugar under one firm name and receive the sugar at the Jay Street Terminal and transport it therefrom to the Jersey shore under another firm name resembles an attempt to make a distinction where no difference in substance exists.

The claim that in handling the shipments of Arbuckle and Jamison at the Jay Street Terminal, and in transporting the shipments from said terminal to the Jersey shore, Arbuckle and Jamison act as agents

of the carriers is of like character and is in conflict with the admitted facts.

We have seen that Arbuckle and Jamison own the Jay Street Terminal and all instrumentalities used in operating it as well as the instrumentalities used in transporting their shipments therefrom to the Jersey shore, and that their employees perform all services connected with such operation and transportation. It is also true, as shown by the petition of the carriers (Rec., 5), that Arbuckle and Jamison, under the name of Jay Street Terminal, are responsible for all loss of or damage to said shipments which occurs prior to the time when the shipments are delivered to the carriers on the Jersey shore, and are also responsible to the carriers for all claims, injuries, or damages arising under bills of lading issued by the Jay Street Terminal in the names of the carriers. So far, therefore, as the shipments of Arbuckle Brothers are concerned there appears to be nothing left of the agency referred to except the name. The liability of the carriers under the bills of lading is merged in the liability assumed by Arbuckle and Jamison, under the name of Jay Street Terminal, in said contracts.

Under these circumstances it is clear that the question of whether Arbuckle Brothers sell their sugar f. o. b. Brooklyn is a matter of no consequence whatever. It will be observed that regardless of the answer to that question they receive, under the name of Jay Street Terminal, the allowances paid by the carriers.

It may be that the discrimination is practiced in accordance with the tariffs published and filed by the carriers and in accordance with the terms of the contracts above mentioned, but we fail to see wherein it is thus rendered less unjust than it would be otherwise. It is apparent that the preference given to Arbuckle Brothers and the prejudice to which the Federal Sugar Refining Company is subjected are as injurious in their effect upon the latter company, and as great, as they would be if the allowances referred to were paid by the carriers without tariff or contract authority of any kind.

However, it is said that the allowances paid on the Arbuckle Brothers' shipments cover services of a character not performed, and the use of some instrumentalities not furnished, by the Federal Sugar Refining Company; and in this connection attention is called to the terms of said contracts, which provide that the allowances paid shall include, not only the services performed, and the use of the instrumentalities furnished, in connection with the transportation of the shipments of Arbuckle Brothers from the Jay Street Terminal to the Jersey shore, but also the use of said terminal as a place where the shipments may be delivered for transportation and the services performed in connection with them after such delivery and before the transportation of the shipments to the Jersey shore begins.

It is true that Arbuckle and Jamison furnish a place within said lighterage limits, namely, the Jay Street Terminal, where their shipments are handled prior to

the time when the transportation of the shipments to the Jersey shore begins and also furnish all instrumentalities used in said transportation, free of expense to the carriers, and perform, or cause to be performed, without expense to the carriers, all services connected with such handling and transportation; but the Federal Sugar Refining Company furnishes a place within said lighterage limits, namely, Pier 24, where their shipments are handled prior to the time when the transportation of the shipments to the Jersey shore begins and also furnishes all instrumentalities used in said transportation, free of expense to the carriers, and performs, or causes to be performed, without expense to the carriers, all services connected with such handling and transportation. We are therefore unable to see how it can be consistently claimed that the allowances paid on the shipments of Arbuckle Brothers cover services of a character not performed, or instrumentalities not furnished, in connection with its shipments, by the Federal Sugar Refining Company. The expense to the carriers of the transportation services performed by them is the same in each instance, regardless of whether such services pertain to the shipments of Arbuckle Brothers or to the shipments of the Federal Sugar Refining Company.

The fact that the allowances paid by the carriers on the shipments of Arbuckle Brothers are, with only a few exceptions, the same as the allowances so paid on other traffic shipped by and consigned to members of the general public other than Arbuckle Brothers

is a matter of no importance. Sugar is the only traffic to which the order of the Commission applies, and the record shows that in the proceedings before the Commission, upon which the order is based, a discrimination pertaining to the transportation of sugar was the only matter complained of. (Rec., 38–40.) The validity of an order based upon a discrimination complained of and held by the Commission to be unlawful does not depend upon the lawfulness of another matter concerning which no complaint is made; and this is especially true where, as in this case, no attempt has been made to show that such other matter constitutes either an unjust discrimination or other violation of the act.

Bills of lading issued by the carriers, which pertain to the Federal Sugar Refining Company's shipments of sugar, show that said shipments are received for transportation by the carriers on the Jersey shore, but that circumstance does not in any way tend to mitigate the discrimination referred to; it simply establishes that the risk assumed by the Federal Sugar Refining Company in connection with its shipments is the same as the risk assumed by Arbuckle and Jamison in connection with their shipments; and of course the risk assumed by the carriers is, in each instance, the same, regardless of the question of ownership.

The shipments of the Federal Sugar Refining Company which are delivered to the carriers on the Jersey shore do not originate at Yonkers, although the sugar included in those shipments does. In this connection

it will be observed that the facts stated by the Commission in its report are the same in substance as the allegations contained in the petition of the carriers. (Rec., 47–49, 8–9.) However, the former are more full and complete than the latter. Upon this point the Commission said:

> A lighter reports every morning at the dock of the complainant at Yonkers and receives such sugar in barrels, boxes, or other packages as may be ready for shipment. The superintendent of the refinery, having been previously advised from the company's general offices in New York City of the quantity of sugar required in order to fill accepted contracts, has the sugar ready at the stringpiece and it is loaded into the lighter by employees of the transportation company. The officer in charge of the lighter gives a receipt for the shipment and in return is handed a document showing the complainant as the consignor at Yonkers and the consignee at 138 Front Street. It also gives the contract numbers, together with the weight and description of the packages. The lighter then proceeds with its load to Pier 24, which, as heretofore stated, is within the lighterage limits. It is there made fast to the dock and notice of its arrival is given at the general offices of the complainant. Thereupon the complainant issues shipping instructions to the transportation company and hands to its representative a bill or bills of lading for execution by the defendant carriers upon the delivery of the sugar on the Jersey shore. Upon receiving these instructions and

the bills of lading the lighter proceeds to the freight depots on the Jersey side and there makes delivery of its cargo by unloading the sugar upon the car platforms of the carrier or carriers named in the lading papers. The bills of lading are executed by the carriers and returned to the lighterman.

* * * The lighter is actually made fast to that pier when it arrives from Yonkers; sometimes a portion of its cargo is discharged there and held in storage, presumably for local use; the lighterman has no authority to go further for any instructions for a further movement, and must wait there for authority and instructions; upon receiving orders he lighters the cargo as directed, sometimes to one station and sometimes to another, the cargo not infrequently being divided among the several receiving stations across the river, or being delivered to water lines or railroads other than the defendants, all in accordance with the instructions received at Pier 24. (Rec., 47–49.)

It will thus be seen that the transportation of the shipments which originate at Yonkers and all matters pertaining thereto become a thing of the past before the transportation from Pier 24 of the shipments which are delivered to the carriers on the Jersey shore begins. At the time the shipments start from Yonkers it is impossible for anyone to know whether they will be forwarded to the Jersey shore or what their final destination will be. At that time the Federal Sugar Refining Company may have decided

to forward the shipments over the carriers' lines of railway to western points of destination, but either before or after the shipments reach Pier 24 it may change its mind and either send them to other destinations or sell the sugar included in the shipments for local consumption in New York City.

However, it is said that the practice of shipping to and from Pier 24 is indulged in for the purpose of showing delivery to the carriers on the Jersey shore of shipments which originate at a point within said lighterage limits, and thus secure, under the rulings of the Commission, for the Federal Sugar Refining Company, advantages it could not otherwise obtain.

In the proceeding before the Commission, referred to herein as No. 1082, it was shown that the shipments of the Federal Sugar Refining Company were transported from Yonkers direct to the Jersey shore, and, as above shown, four members of the Commission concluded that the carriers were under no obligation to pay allowances for transportation outside the lighterage limits, while three members expressed the opinion that, regardless of the origin of the shipments, the discrimination practiced was unjust. One of the four, however, in stating the reasons which prompted him to concur in the majority opinion, said:

> In my opinion, if the complainant were located within the lighterage limits the defendants could not lawfully permit complainant's competitors to lighter their sugar and receive pay for that service and refuse to permit com-

> plainant to lighter its sugar and receive the same compensation for that service. (Rec., 33.)

It may be true, therefore, that in deciding to locate its general offices in New York City and ship sugar from a point within said lighterage limits the Federal Sugar Refining Company was somewhat influenced by the above ruling of the Commission.

In its report in this case, though, five members of the Commission, in expressing their views upon the point under consideration, said:

> * * * If the defendants accord Arbuckle Brothers the privilege of lightering their sugar from their dock and make them an allowance therefor, we regard it as axiomatic, under the principles of this legislation, that they must accord a like privilege and make a like allowance to the complainant from Pier 24, the complainant being a competitor in the same line of business and reaching the same markets of consumption. Indeed, we see little ground, upon the facts now before us, for denying the privilege and the allowances to the complainant from the point where its sugar crosses the lighterage limits established by the defendants. That, however, is a question that need not be discussed, for we have found that the complainant now lighters its sugar from Pier 24, which is within the lighterage limits. (Rec., 56.)

But whether the Federal Sugar Refining Company was or was not influenced as above suggested is a matter of no consequence whatever if we understand

correctly a decision rendered by this court in what we regard as an analogous case.

In the case of *Gulf, Colorado & Santa Fe Railway Company* v. *Texas*, 204 U. S., 403, the question presented for determination was whether a carload of corn which originated at Hudson, S. Dak., and was transported from that point by railroad via Kansas City, Mo., and Texarkana, Tex., to Goldthwaite, Tex., was, while being transported from Texarkana to Goldthwaite, an "interstate" or an "intrastate" shipment, the materiality of an answer to that question being that the charges for transportation properly collectible would be greater if the shipment were interstate than if it were intrastate. The pertinent and material facts may be summarized as follows:

The Hardin Grain Company sold to Saylor and Burnett delivered at Goldthwaite some corn, and afterwards, for the purpose of filling the contract of sale, purchased from the Harroun Commission Company delivered at Texarkana the carload of corn above mentioned and some other corn. Said carload was shipped from Hudson to Texarkana under one bill of lading and from Texarkana to Goldthwaite under another bill of lading, but, without breakage of seals and without other interference with its contents, the car containing the corn was forwarded from Kansas City to Goldthwaite. At the time the Hardin Grain Company purchased said carload as aforesaid it intended to send it to Goldthwaite, and the reason why it purchased the corn delivered at Texarkana and had it reshipped from that point was because it

wished to make the shipment from Texarkana to Goldthwaite intrastate and thus secure the advantage in transportation charges above mentioned. (Id., 404–408.)

Under these circumstances this court ruled that the intention of the Hardin Grain Company was a mattter of no importance and held that the shipment delivered in Goldthwaite originated as a matter of law in Texarkana. (Id., 411–414.)

The appellees say that the carriers are now and always have been ready and willing to accept delivery of the shipments of the Federal Sugar Refining Company at any point within the lighterage limits and lighter them therefrom to the Jersey shore at their own expense, and that, therefore, the findings of the Commission, that the discrimination in question is unjust and that it gives to Arbuckle and Jamison undue preference and advantage and subjects the Federal Sugar Refining Company to undue prejudice and disadvantage, are untenable.

We think this indicates that the appellees have misconceived the discrimination complained of by the Federal Sugar Refining Company and condemned by the Commission. The matter complained of was the payment of allowances to Arbuckle and Jamison on their shipments of sugar when delivered by them to the carriers on the Jersey shore and the carriers' refusal to pay to the Federal Sugar Refining Company like allowances on its shipments of sugar when delivered by it to the carriers on the Jersey shore, and it is apparent that this discrimination would not

be removed even if the carriers accepted delivery of the Federal Sugar Refining Company's shipments at Pier 24 and lightered them therefrom at their own expense and with their own facilities and employees to the Jersey shore, unless the carriers should discontinue payment of the allowances to Arbuckle and Jamison and accept delivery of the Arbuckle and Jamison shipments at the Jay Street Terminal or at some other point within the lighterage limits and transport them therefrom at their own expense and with their own facilities and employees to the Jersey shore.

In the dissenting opinion of Chairman Knapp (Rec., 61) it is said that upon the oral argument before the Commission counsel for the Federal Sugar Refining Company admitted that his client would not be benefited if the Jay Street Terminal were transferred to and operated by the carriers, and a similar statement is contained in the dissenting opinion of Commissioner Prouty. (Rec., 65.) This suggests the thought that the conclusions of the members of the Commission who dissented would be better supported by conditions which might be brought about by certain changes than they are by the conditions which actually exist at the present time.

However, the admission referred to could not so operate as to change the fact, and it is clear that the fact is in conflict with the admission.

We have seen (Rec., 46) that in most instances the rates of transportation on sugar to said western points of destination are the same from the Jersey

shore as from Yonkers, notwithstanding that where the shipments of sugar are delivered to the New York Central & Hudson River R. R. Co. at Yonkers for transportation they are redelivered in turn by that company to the carriers who are appellees herein, on the Jersey shore, for transportation therefrom to said western points of destination, but in such cases the sugar is not promptly transported from Yonkers to the Jersey shore, and the only reason why the Federal Sugar Refining Company lighters its sugar from Yonkers to the Jersey shore is to avoid the delay which would otherwise result and to enable it to compete successfully in the sale of sugar at said western points of destination with Arbuckle and Jamison, who also lighter their shipments of sugar to the Jersey shore.

But it is said that by the publication and filing of tariffs the carriers have obligated themselves to accept delivery of the shipments at any point within the lighterage limits and transport them therefrom to said western points of destination; that therefore the transportation from the Jay Street Terminal to the Jersey shore is a part of the transportation which the carriers must perform for the New York rate, and that where carriers are under obligation to perform certain transportation services they may either perform those services themselves, or, under section 15 of the act, pay a shipper a reasonable compensation for doing so, regardless of how such an arrangement may affect another shipper. In other words, the carriers contend that they may pay one shipper an allowance

for performing certain transportation services and refuse to pay another shipper a like allowance for the performance of a like service, under similar circumstances and conditions, because such employment is authorized, but not required, by law; and they contend that, for this reason, any discrimination which results from employment by them of one shipper and their refusal to employ another shipper can not be held to be unlawful, unless it be shown that the compensation paid to the shipper employed, when measured by the services performed therefor by the shipper, is unreasonable.

This is equivalent to saying that one provision of the act may be seized upon and used regardless of other provisions of the same act to justify inequalities in the treatment accorded by carriers to shippers, while this court, in speaking of the insterstate commerce act as a whole, has repeatedly said that it was enacted for the purpose of preventing such inequalities.

Interstate Commerce Commission v. *Baltimore & Ohio R. R. Co.*, 145 U. S., 263, 277;

Union Pacific Ry. Co. v. *Goodridge*, 149 U. S., 680, 690;

Cincinnati, New Orleans & Texas Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S., 184, 197;

Texas Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S., 197, 219;

Interstate Commerce Commission v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S., 479, 506;

Union Pacific R.R.Co. v. The Updi
Grain Co. et al., 222 U.S., ______

Wight v. *United States*, 167 U. S., 512, 518;

Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S., 144, 172;

East Tennessee, Virginia & Georgia Ry. Co. v. *Interstate Commerce Commission*, 181 U. S., 1, 18;

New York, New Haven & Hartford R. R. Co. v. *Interstate Commerce Commission*, 200 U. S., 361;

Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S., 426, 439;

Interstate Commerce Commission v. *Chicago Great Western Ry. Co.*, 209 U. S., 108, 119;

Interstate Commerce Commission v. *Illinois Central R. R. Co.*, 215 U. S., 452, 477;

Interstate Commerce Commission v. *Delaware, Lackawanna & Western R. R. Co.*, 220 U. S., 235, 253.

The record in this case shows that on an average a large tonnage of sugar is shipped daily to said western points of destination over the lines of the carriers who are appellees herein by Arbuckle and Jamison and also by the Federal Sugar Refining Company and that both of those shippers deliver their shipments to the carriers for transportation on the Jersey shore. It further shows that the expense to the Federal Sugar Refining Company of making such delivery is 3 cents per 100 pounds, but that, although Arbuckle and Jamison make delivery of their shipments at their own expense, they are paid therefor by the carriers, according to the destinations of the shipments, either 3 cents or 4½ cents per 100 pounds, while the carriers do not pay like allow-

ances or any allowances at all to the Federal Sugar Refining Company.

This indicates the opinion of the Federal Sugar Refining Company concerning the value of the privilege of making delivery at the Jersey shore, and it also shows the handicap under which that company operates in competing with Arbuckle and Jamison. We have seen that this discrimination results from circumstances and conditions which are wholly artificial and for which the carriers are alone responsible, and we therefore submit that a holding that the discrimination can not be removed because it is authorized by the provision of section 15, above referred to, is a very unreasonable construction of that provision, and that such construction ought therefore to be regarded as unsound.

We think the history of this case shows clearly that the Commission has felt compelled recently to examine more closely than it formerly deemed necessary contracts entered into by and between carriers and large shippers, and restrain the operation of such contracts where, in the judgment of the Commission, the discrimination and preference and prejudice prohibited by sections 2 and 3 of the act could not otherwise be prevented. The Commission is of the opinion that it has been given such authority by the law under which it operates, and does not believe either that the amendments of June 29, 1906, contained in the Hepburn law, were made for the purpose of limiting its authority over discriminations, or that, when read in connection with other provisions of the act, they

have that effect. On the contrary, it thinks those amendments were made to place in the hands of the Commission, in addition to the remedies which existed prior to that date, the remedy included in said section 15, as aforesaid.

The reasonableness *per se* of the allowances paid by the carriers to Arbuckle and Jamison has not been passed upon by the Commission, nor does that question affect in any way the discrimination between Arbuckle and Jamison on the one hand and the Federal Sugar Refining Company on the other. That question might become important if an attempt were made to show that the rates exacted by the carriers for the transportation of sugar as compared with the rates exacted by them for the transportation of other traffic were unjustly discriminatory; but no such matter is involved in this case. Under the order of the Commission the carrier may discontinue the allowances paid on sugar, continue them as they are now, or change them to such other amounts as the carriers may deem proper, but they may not discriminate in the payment of the allowances as between Arbuckle and Jamison on the one hand and the Federal Sugar Refining Company on the other.

In dealing with the matters under consideration the Commission has brushed aside artificial barriers, which are mere matters of form, and confined itself to the substance of the discrimination called to its attention by the Federal Sugar Refining Company. Under the circumstances hereinbefore referred to in detail we think it was justified in doing so, and that

the appellees' contentions concerning different name under which Arbuckle and Jamison operate, th matter of agency, liability under bills of ladin differences as between shipments f. o. b. Brookly and other shipments, differences as between point of origin of the shipments of sugar, etc., should b considered as of no importance. The Commissio has shown that the discrimination in question wa born of a desire to give Arbuckle and Jamison preference over other shippers, which preference wa effected by the payment of illegal rebates, and w think a similar disposition is indicated by the char acter of the matters advanced by the appellees at th present time in justification of the attempt to con tinue the discrimination in favor of Arbuckle an Jamison and against the Federal Sugar Refinin Company.

For the reasons hereinbefore given in detail w submit that the Commerce Court erred in failing t dismiss the petitions for want of equity.

II.

THE COURT ERRED IN SUBSTITUTING ITS OW JUDGMENT FOR THE JUDGMENT OF THE COM MISSION CONCERNING THE CHARACTER O THE DISCRIMINATION WHICH CONSTITUTE THE BASIS OF THE COMMISSION'S ORDER.

In the case of *Interstate Commerce Commission* *Illinois Central Railroad Company*, 215 U. S., 45 this court, speaking through the present Chief Justic in prescribing the rules to be followed by Feder

courts, where called upon to suspend or set aside an order of the Commission, said:

> Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (*a*) all relevant questions of constitutional power or right; (*b*) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (*c*) a proposition which we state independently, although in its essence it may be contained in the previous one, viz, whether, even although the order be in form within the delegated power, nevertheless it must be treated as not enbraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. * * * Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.
>
> Power to make the order, and not the mere expediency or wisdom of having made it, is the question (id. 470).

To the same effect see:

Baltimore & O. R. Co. v. *United States ex rel. Pitcairn*, 215 U. S., 481;

Southern Pacific Company v. *Int. Com. Com.*, 219 U. S., 433;

Int. Com. Com. v. *Delaware, Lackawanna & Western Railroad Company*, 220 U. S., 235, 248–249, 251–252.

We think it clearly appears that every question which was submitted to the Commerce Court for determination in this case is included in the exclusive jurisidiction of the Commission, as defined by this court in the cases above cited, and therefore submit that the Commerce Court erred in substituting its own judgment for the judgment of the Commission as aforesaid.

III.

THE COURT ERRED IN ENTERING THE INTERLOCUTORY DECREE AND GRANTING THE TEMPORARY INJUNCTION, WITHOUT COMPLYING WITH THE REQUIREMENTS OF SECTION 3 OF THE COMMERCE COURT ACT OF JUNE 18, 1910.

We think proper to repeat in substance under this point what was said by us under the same point in case No. 719.

The language of section 3 of the Commerce Court act of June 18, 1910, is as follows:

> That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or

suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the Commerce Court other than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application.

And in section 2 of said Commerce Court act it is provided that:

An appeal may also be taken to the Supreme Court of the United States from an interloc-

> utory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree.

It is our contention that when the above provisions are read together it clearly appears that the Congress intended to make a distinction in procedure between ordinary suits in equity on the one hand and suits instituted to enjoin enforcement of an order of the commission on the other hand, and provide that the Commerce Court shall not, by granting a temporary injunction, interfere with the work of the commission, except where, in the opinion of the court, irreparable injury will otherwise ensue.

We also think it plain that the Congress intended to require the Commerce Court, in a case where it issues a temporary injunction, to state the reason or reasons upon which it bases its right to so interfere; that is, state the nature of the damage, and point to the evidence upon which it bases its opinion that irreparable damage will ensue if the temporary injunction is not issued.

The sections referred to are included in the same act and were enacted into law at the same time. The court will therefore construe each in such a manner as to give force and effect, if possible, to the other. And we respectfully submit that a construction of section 3 contrary to that above indicated would render valueless the portion of section 2 which pertains to interlocutory orders and decrees.

Section 2 contains, in addition to the provision relating to appeals from interlocutory orders, a provision pertaining to appeals from final decrees; but it is apparent that the former provision is of much greater value than the latter to those interested in proper and effective regulation of transportation agencies.

If the Commerce Court may, simply as a matter of discretion, for its own convenience, the convenience of carriers, or some other similar reason, enjoin temporarily enforcement of an order of the Commission, it may, we submit, destroy, for all practical purposes, the power of the Commission and render impossible the regulation above mentioned: First, because transportation rates are so interwoven, and the practices of carriers in one locality so affect other localities and shippers therefrom and thereto, that one order made by the Commission and voluntarily obeyed by the carriers against whom the order is directed, although just and proper when made, may be rendered very unjust and improper by a decree of a court enjoining temporarily enforcement of an order contemporaneously or subsequently made; and, second, because in section 15 of the act to regulate commerce it is provided that:

> All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission.

If the life of the Commission's order becomes extinct before the final decree of the court is made it is difficult to see wherein the power of the Commission to make the order is of any value. A second order could not be made until after a second investigation had been had, and if made after such investigation it would be subject to the discretion of the Commerce Court in the same manner and to the same extent as the first order had been.

In this case, not knowing what else to do, we have proceeded upon the assumption that the Commerce Court held against the Commission on every issue of law and of fact made by the pleadings of the parties, but such assumption may not be correct. Had the Commerce Court pointed out wherein it considered the order an abuse of, or in excess of, the power of the Commission, an appeal to this court might have been avoided. The Commission, by a modification of the order, might have been able to remove the legal defect pointed out by the Commerce Court; but, under present circumstances, there appears to be nothing for this court to do except to examine the entire record and determine whether the matters included therein justify the action taken by the Commerce Court.

A construction of the law which makes necessary such a method of procedure does not appear to us to be reasonable; because it indicates that the Congress attempted to do something which is in excess of its power under the Constitution; that is, confer upon this court original jurisdiction in the premises.

In the case of *Baltimore & Ohio Railroad Company* v. *Interstate Commerce Commission*, 215 U. S., 216, the matter under consideration was an order of the Circuit Court for the District of Maryland. In substance the order was, "that this case be certified for review to the Supreme Court of the United States," and that "a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States; and the same is transmitted accordingly." And in that connection this court said:

> The act of Congress of February 11, 1903, provided in its first section that, on the certificate of the Attorney General, the case should be assigned for hearing before not less than three judges, and that, "in the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal, as hereinafter provided." The order of the Circuit Court pursues the language of this provision and attempts to send up the whole case to be determined by this court. This invokes the exercise of original jurisdiction and can not be sustained. (Id., 223–224.)

To the same effect see: *Southern Pacific Company et al.* v. *Interstate Commerce Commission*, 215 U. S., 226.

We are confident that this court will not construe the Commerce Court act, either so as to cause the provisions of section 3 to nullify an important and

essential provision of section 2, or in such a manner as to establish that, in framing the act, the Congress exceeded the powers conferred upon it by the Constitution.

We therefore submit that the Commerce Court erred in granting the temporary injunction, without expressing the opinion that irreparable damage would ensue if the injunction were not issued and pointing to the evidence upon which it based such opinion.

If, however, this court be of opinion that the discretion referred to exists, then we insist that, for reasons hereinbefore given in detail, a determination of the questions presented to the Commerce Court did not call for, or justify, the exercise of judicial discretion; and of course it can not be successfully contended that the Congress either intended to, or that it could, confer upon the Commerce Court, or any other court, discretion legislative in character.

Based upon the record in this case and for the reasons hereinbefore given we ask this court to reverse the decree of the Commerce Court, and remand the case to that court, with instructions to dismiss the petitions of the appellees.

Respectfully submitted.

P. J. Farrell,
Solicitor for Interstate Commerce Commission, Appellant.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, THE INTERSTATE Commerce Commission, and The Federal Sugar Refining Company, appellants,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, The Central Railroad Company of New Jersey, et al.

No. 722.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

STATEMENT, BRIEF, AND ARGUMENT FOR THE UNITED STATES.

This is a suit instituted in the Commerce Court of the United States to enjoin the enforcement of an order by the Interstate Commerce Commission.

The parties.

The complainants in the bill are The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna and Western Railroad Company, The Erie Railroad Company, The Lehigh Valley Railroad Company, The New York, Ontario and Western Railway Company, and The Pennsylvania Railroad Company. The

Brooklyn Eastern District Terminal and John Arbuckle and William A. Jamison intervened and were made parties complainant, they being interested to defeat the order of the Commission.

The defendant named in the bill is the United States. The Interstate Commerce Commission appeared by its counsel, and the Federal Sugar Refining Company intervened and was made a party defendant, it being interested to support the order of the Interstate Commerce Commission.

The order

of the Interstate Commerce Commission involved was made on December 5, 1910, upon complaint of the Federal Sugar Refining Company against the railroad companies designated above, and is as follows (R., 67, 68):

> This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof, and having found that the allowances paid by the above-named defendants to Arbuckle Brothers on their sugar brought by them on floats from lighters to the regular terminals of defendants on the Jersey shore in the State of New Jersey, while at the same time paying no such allowances to complainant on its sugar brought by it on lighters to the defendants' said regular ter-

> minals on the Jersey shore, unduly discriminate against said complainants and unduly prefer said Arbuckle Brothers in violation of the act to regulate commerce.
>
> It is ordered, that the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain, from paying such allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowances to said complainant on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce.

This order is accompanied by an elaborate report of the Commission, which may be found on pages 44 to 60 of the record.

By the bill the order of the Commission is assailed and the allowances held to be discriminative are defended on the ground that they are payments to the Jay Street Terminal for its services in performing part of the transportation which the railroad companies undertake to perform in shipments from the Jay Street Terminal to the country west of the Hudson.

Proceedings in the Commerce Court.

The defendants moved to dismiss the bill of complaint for want of equity and because the order of the Commission was an adjudication of matters of fact, as to which its judgment was conclusive.

The complainants moved for a temporary injunction against the Commission's order.

The motion to dismiss was denied and the motion for temporary injunction was granted. No opinion was delivered by the court.

The defendants appealed and assigned error in various forms. The assignments of error by the Commission and the Federal Sugar Refining Company may be found in the record beginning at page 128 and those of the United States beginning at page 133. No good purpose will be served by repeating or even summarizing them here.

The proposition presented on behalf of the United States is that—

The order of the Commission is the adjudication of a matter of fact, made in accordance with the fact, and is not subject to review by the Court of Commerce.

ARGUMENT.

There are some matters of fact and substance in this case, and some matters of mere sham and shadow. The facts are that the Federal Sugar Refining Company has a refinery at Yonkers, N. Y., on the Hudson River, within the port of New York, but just outside the limits of the city of Greater New York; and that Arbuckle Brothers have a sugar refinery on Long Island, within the limits of the Borough of Brooklyn.

The railroad companies named have not, any of them, a line to either Yonkers or Brooklyn. The tracks of all of them terminate on the west shore of New York Harbor.

The Federal Sugar Refining Company sells some of its product in the States west of the Hudson; Arbuckle Brothers do the same as to the product of their refinery.

The railroad companies can not come to the Federal Sugar Refining Company for sugar to be shipped, and so the Federal Sugar Refining Company takes the sugar to the railroads at their terminals on the west shore of the Hudson in the State of New Jersey.

The railroad companies are under like disability with respect to the sugar to be shipped from the refinery of Arbuckle Brothers, and so the sugar destined for shipment to the west is taken by Arbuckle Brothers to the terminals of the railroad companies on the west bank of the Hudson in the State of New Jersey.

The railroad companies receive the sugar at their terminals and ship it to its destination—the sugar of the Federal Sugar Refining Company and the sugar of the Arbuckle Brothers—at ostensibly the same charge for transportation; and they render exactly the same service to the Federal Sugar Refining Company and to Arbuckle Brothers; that is to say, they take the sugar of each at the terminals in New Jersey and transport it to its destination in the western States.

The railroad companies, each and all of them, pay to Arbuckle Brothers three cents per hundred pounds on all sugar received from them and shipped not farther west than Pittsburgh and Buffalo, and four and one-fifth cents on all sugar received from them and shipped by them west of Pittsburgh and Buffalo,

reducing by so much the net rate for transportation from the Jersey terminals to the western destinations.

The railroad companies, each and all of them, pay to the Federal Sugar Refining Company nothing on the sugar received from it and shipped to the west, thus making it pay three cents or four and one-fifth cents per hundred pounds, according to the destination, more for shipment of sugar to the west than is paid by Arbuckle Brothers.

The Interstate Commerce Commission determined as a matter of fact that this was a discrimination against the Federal Company and in favor of its competitor, Arbuckle Brothers, and ordered the railroad companies to stop it, leaving them free to withdraw the allowance from Arbuckle Brothers or to grant it to the Federal Company.

These are the matters of fact and substance in the case. There are, however, some things of sham and shadow, designed to obscure the matters of fact and substance.

Free lighterage limits.

One of these shams and shadows is the limit of free lighterage. Brooklyn, where the Arbuckle Brothers are located, is within the limit. Yonkers, where the Federal Company is located, is without the limit.

But this limit is a mere myth, so far as the sugar business is concerned. The railroad companies do not, any of them, lighter sugar across the harbor, and never did, unless many years ago, and then only for the short time that was required for the Havemeyers to bring them to terms, as to which a little more hereafter.

The Brooklyn Eastern District Terminal takes the sugar of the American Sugar Refining Company from the refineries of that company to the Jersey terminals of the railroad companies. In the beginning the same persons owned or controlled both the American Sugar Refining Company and the Brooklyn Eastern District Terminal. What the present relations between these two institutions are is not shown beyond the fact that there is apparently no community of ownership. The Commission made no order with respect to these companies.

The Jay Street Terminal takes the sugar of Arbuckle Brothers from their refineries to the Jersey terminals of the railroad companies. What the Jay Street Terminal signifies will be considered presently. For this service the railroad companies pay the Jay Street Terminal the three cents and four and one-fifth cents per hundred pounds, which the Commission has determined to be an allowance, from their rates for transportation, to the Arbuckle Brothers.

The Ben Franklin Transportation Company takes the sugar of the Federal Company to the Jersey terminals of the railroad companies, and for this service the Federal Company pays the Ben Franklin Company three cents per hundred pounds and gets no compensating allowance from the railroad companies.

The lighterage service in the three cases is the same, so far as concerns the railroad companies. The sugar is in each case brought and delivered to them at their Jersey terminals. The only difference in this lighterage service is the singular one that in the case of

Arbuckle sugar the cost of lighterage depends upon the length of haul by the railroad companies after they receive it—forty per cent more to lighter the same amount of sugar across New York Harbor when it is destined to St. Louis than when it is destined to Pittsburgh. This peculiar quality does not exist in the sugar of the Federal Company. The cost of handling that in New York Harbor is not affected by the length of the subsequent rail haul.

In simple truth the parties forgot to tuck in the ears of the rebate when they put over it the sham cover of transportation service.

The fact, the substantial fact, remains, in spite of the misleading suggestion of the lighterage limit, that in all sugar going to the west over the lines of the railroad companies the only service rendered by the railroad companies, either for Arbuckle Brothers or for the Federal Company, is to haul the sugar from their Jersey terminals to its western destination.

The Jay Street Terminal.

The railroad companies say that "among other terminal freight stations established by them within the said lighterage limits is the Jay Street Terminal." Not even in a formal sense is this true. The most that could be conceded even as a matter of form is that they adopted it.

What is the Jay Street Terminal? In a material sense it is a tract of ground in Brooklyn, on East River, adjoini g the location of the Arbuckle Brothers' sugar refineries, and equipped with the facilities

necessary for the receipt and delivery of freight and for doing a lighterage business in New York Harbor.

Otherwise Jay Street Terminal is a partnership composed of two individuals, William A. Jamison and John Arbuckle. And Arbuckle Brothers is also a partnership, composed of two individuals, John Arbuckle and William A. Jamison. And the John and the William in both firms are the same men. There is no difference except in the order in which their names may be stated. William A. Jamison and John Arbuckle own and operate Jay Street Terminal, and John Arbuckle and William A. Jamison own and operate the Arbuckle Brothers' refineries. The Jay Street Terminal is the mouth of a creature of which Arbuckle Brothers is the maw. Jay Street Terminal feeds and Arbuckle Brothers grow fat.

It was argued in the Commerce Court, and may be repeated here, that here are two firms and not one—two entities, which are not identities but different entities—and the Interstate Commerce Commission erred grossly in treating a payment to Jay Street Terminal as made to Arbuckle Brothers.

We need not consider what would be the rights of creditors who had dealt with Jay Street Terminal and Arbuckle Brothers as being different firms in case of insolvency or bankruptcy, for we are concerned with something very different. If Arbuckle Brothers are not in their own name entitled to the allowance in question, they are not entitled to it under the *alias* of Jay Street Terminal. An *alias* has no such func-

tion. It may conceal a crime, but it can not consecrate it.

What is done by and paid to Jay Street Terminal must be dealt with as done by and paid to Arbuckle Brothers, because such is the fact. And so the Commission was right in tearing off the mask and dealing with what was then disclosed.

And so the fact is that Arbuckle Brothers in connection with their refineries own and operate a shipping plant, with all its incidents, and lighter their own sugar across the harbor to the Jersey terminals of the railroads, and there, and not elsewhere, deliver it to the railroad companies. No form of contract or arrangement can alter this fact. Arbuckle Brothers could not charge the consequences of their own neglect while lightering the sugar to the railroad companies. And by the express terms of the contract the sugar is in their custody and control, and they are responsible therefor until the railroad company takes it upon its own tracks.

The Federal Company does not own shipping facilities as extensive as those of Arbuckle Brothers, but it provides them by hiring, and it does just what its competitor does—it delivers its sugar to the Jersey terminals; and it is in view of these equal relations entitled to equal treatment.

It is the prime purpose of the law to secure this equal treatment for competitors in business where conditions are similar. And a railroad company may not by its mere *ipse dixit* create dissimilarity where it would not otherwise exist. It can not adopt the

Arbuckle Brothers plant as one of its public terminals and refuse to adopt for the same purpose the plant of a competitor, when the result is to create marked discrimination. The allowance here is from fifteen to twenty-one dollars per carload of fifty thousand pounds, according to destination—enough to confer an insuperable advantage in the trade.

The adoption by the railroad companies of the Arbuckle plant as a terminal station, so far as concerned the shipments of Arbuckle Brothers, was against public policy and public law.

In the bill filed by the railroad companies it is said (R., 6) that "the Jay Street Terminal serves the shippers of a large and important manufacturing and shipping territory, including about one-third of the densely populated part of Brooklyn." We accept this statement as true. There is much more in the record as to the commanding position of this terminal. Mr. Jamison, in his affidavit, says (R., 77) that "when the Jay Street Terminal was established it was practically impossible for the railroad companies to acquire and establish a terminal accessible to the shipping territory above described in any other way than by contract with the owners of the Jay Street Terminal property." We do not concede this entirely, for the railroad companies had the right of eminent domain. It is obvious, however, that the Arbuckle Brothers believed that they had a site monopoly of shipping facilities, and they used it to the utmost. In their contract with the railroad companies by which the Arbuckle plant was adopted as a terminal by the

railroad companies it was stipulated (R., 19) that "Said Railroad Company will not, during the continuance of this agreement, unless legally compelled to do so, establish or maintain any freight stations within the limits of said borough of Brooklyn between said Catherine Ferry and said United States navy yard." The stipulation was clearly illegal as giving the Jay Street Terminal a monopoly of terminal facilities. It was the duty of each of the railroad companies to exercise its judgment and do whatever it believed, so far as it could, the public welfare required. But here, in the interest of Arbuckle Brothers, *alias* Jay Street Terminal, it was to serve the public welfare only so far as legally compelled.

It must be borne in mind that the Havemeyers also had a large shipping plant adjacent to their sugar refineries which served a large territory, and in the contract with the railroad companies adopting their plant as a terminal station it was stipulated (R., 101) that "It is further understood and agreed that within the limits of the city of Williamsburgh, so called, extending from Wallabout Bay, on the south, to Newton Creek, on the north, not inclusive of either, the said railroad company, unless legally compelled to do so, will not, during the continuance of this contract, establish or maintain any freight stations, nor within said limits receive on barges, lighters, floats, or other water craft, for transportation over the line of its railroad to western points hereinafter mentioned, any freights, except as provided for in this contract," etc., etc. This company had another site monopoly

and the railroad companies yielded to it, instead of exercising their power of eminent domain, and cravenly stipulated not to do their duty to the public as they saw it and were able to do it, but only as by legal process they were compelled; that is, they would go as far in disregard of the law as a demurrer to an indictment or a motion in arrest of judgment would afford protection.

These contracts between the railroad companies and the great sugar terminals were part of a plan, and the contracts with one were made in view of the contracts with the other, for it is provided in the Jay Street Terminal contract (R., 17) that "It is agreed, however, that whenever the allowance to Palmers Dock on eastbound or westbound rail-and-lake traffic or both is reduced from four and one-fifth ($4\frac{1}{5}$) cents to three (3) cents per hundred pounds, the same reduction shall be made in the allowance to Jay Street Terminal on rail-and-lake traffic. And it is also agreed that whenever the allowance for like service on such traffic to said Palmers Dock or any other Brooklyn terminal is increased above the rates herein specified, the same increase shall be made in the allowance to said Jay Street Terminal on such traffic." In this stipulation "Palmers Dock" means the Havemeyer terminals.

Thus these two concerns, the Arbuckles and the Havemeyers, appropriated to themselves so much of the Brooklyn water front that, as they now say, and as the railroad companies say, the railroad companies could get no terminal in Brooklyn save by their leave

and license. This, so far as it is true, resulted from a base abdication of power and abjuration of duty by the railroad companies.

Nearly one-half (44%) of all the business, east bound and west bound, now done at the Jay Street Terminal is the shipment of Arbuckle Brothers' sugar. As much sugar does not move eastwardly from this terminal, it is obvious that the west-bound business of the terminal is made up in largest part of Arbuckle sugar. But the public are informed that this terminal is a public station of the railroad companies, from which they will ship sugar at the New York rate, which means free lighterage to Jersey City, and consequently there is no discrimination against anybody, the payment to Arbuckle Brothers being no more than fair compensation for the service rendered by them in receiving, billing, and lightering the sugar.

But the conditions have been deliberately created to repel any competition in the sugar business. No competitor with Arbuckle Brothers would use the Jay Street Terminal, for despite the fiction that it is a railway terminal, the fact remains that it is nothing more than the shipping yard of the Arbuckle refinery. Arbuckle Brothers own this shipping yard and they operate it. Every man employed in or about the yard is hired by them and paid by them and subject to be discharged by them. The record of every shipment made, the duplicate of every way-bill and bill of lading issued, from that terminal belongs to them. Arbuckle Brothers stand as the

initial carrier from Brooklyn to the west, getting part of the through rate on all shipments.

If a competitor should establish himself in the district served by the Jay Street Terminal, he must lay bare his business to Arbuckle Brothers. They would know with whom that competitor dealt and the extent of his sales to each customer. They could hinder and delay shipments and generally handle them in such a way as to make him an unsatisfactory person to deal with. Such conditions are manifestly unfair. As well should the Government permit the importer of raw sugar to do his own inspecting and weighing and depend upon him for accurate reports of quality and weight upon which the customs dues were to be paid. Exalted as may be the standard of morality in the business of refining sugar, no such confidence would be reposed by the Government in an importer, and the railroad companies may not require of a competitor that he repose such confidence in Arbuckle Brothers. The day may come when it will not be misplaced, but that will be the day foretold three thousand years ago, and not yet come, when—

> "The wolf also shall dwell with the lamb,
> And the leopard shall lie down with the kid;
> And the calf and the young lion and the fatling together;
> And a little child shall lead them."

For the present time, however, the conflict of interests is too decided to give assurance that the shipper who owns the terminal and operates it, and has more use of it than anyone else, will deal equally and impartially as between his own business and that of his rivals. "Lead us not into temptation" is

the prayer commended to us for daily use, and it is a rule of practical morality through the observance of which we are delivered from evil.

And this rule has been embodied in the Interstate Commerce Act. The so-called "commodities clause" of section 1 of that act provides:

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroal company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have an interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." [34 Stat. 584, 585.]

In this case the ownership of sugar shipped by Arbuckle Brothers is direct, and their interest in it is immediate and absolute.

And in section 15 of the act as amended it is provided that—

> "It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by

any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used." [36 Stat. 539, 553.]

This provision of the law can not be observed by Arbuckle Brothers. Disregard and contempt of the law inhere in the arrangement with the railroad companies, and constant violation of the law is the unavoidable result of operation under the arrangement.

This is not the case of a shipper rendering a service connected with the transportation of his commodity or furnishing an instrumentality used therein, and receiving fair compensation therefor, as authorized by section 15 of the Interstate Commerce Act. Under that section the shipper remains a shipper, and does not become a carrier or carrier's agent, conducting entirely for a portion of the route the entire business of transportation. If under cover of rendering a service connected with transportation a shipper can turn himself into a carrier or carrier's agent and conduct the entire business of transporta-

tion, then the preceding paragraph of section 15 forbidding disclosure as to shipments made save with the consent of the shipper or consignee, and the commodities clause also, are completely nullified. What is done in the present case is explicitly forbidden by the law, and the consequence is that the Jay Street Terminal can not as to the business of Arbuckle Brothers be deemed a public terminal of the railroad companies, and delivery by Arbuckle Brothers is therefore not made to the companies at that place, but at the Jersey stations, and the transportation by the railroad companies begins at the Jersey shores, and as to that transportation from the Jersey shores to the west they may not discriminate against any competitor of Arbuckle Brothers.

But it is said that eighty-five per cent of the sugar of Arbuckle Brothers is sold f. o. b. the Jay Street Terminal. This, again, is a mere matter of form. It is Arbuckle sugar and remains in the possession of Arbuckle Brothers until delivered to the railroad companies in New Jersey, and Arbuckle Brothers get the allowance on it whether formal delivery is made to the consignee at the Jersey terminals of the railroad companies or at the place of destination of the shipment. In either event the abuse of discrimination exists, and in either event Arbuckle Brothers are admitted to the prohibited knowledge of the competitor's business.

The arrangement between Arbuckle Brothers and the railroad companies a traffic arrangement rather than an operating one.

The history of these allowances shows that they did not spring out of any operating necessities of the railroad companies, but that they were dictated by the sugar men, and secured through their control of the traffic.

The Pennsylvania Company has, and had, a terminal of its own near by that of the Havemeyers, and yet it made the arrangement to do the sugar business of the American Sugar Refining Company through the Havemeyer terminal. The testimony of the freight traffic manager on that subject is as follows (R., 35, 36):

> "Q. You have a terminal of your own near-by the Brooklyn Eastern Terminal, I believe?
>
> "A. Yes, sir.
>
> "Q. Then why do you handle sugar from the Eastern District Terminal?
>
> "A. That is rather a difficult question to answer.
>
> "Q. Is it in order to handle sugar?
>
> "A. Yes, sir.
>
> "Q. In order to get the sugar to handle?
>
> "A. Yes, sir.
>
> "Q. And if you did not handle through the Brooklyn Eastern Terminal, it is your theory that you would not get it to handle?
>
> "A. No; I do not think we would.
>
> "Q. That is because the Brooklyn Eastern District Terminal people, the people who con-

trol that terminal, also control the routing of the sugar, is it not?

"A. Yes, sir.

"Q. And you have the routing through their terminal and make the lighterage payments to them in order to get the tonnage?

"A. That is my understanding."

In their report in the present case the commissioners sum up the matter, saying (R., 50, 51):

> It is our observation that such arrangements are rarely entered into with small shippers, but usually only with shippers that are financially strong and control a large traffic. As is pointed out in the dissenting opinion in the first of these proceedings (17 I. C. C. Rep., at p. 51), an instance of this nature was developed in the investigation entitled "In the matter of allowances for transfer of sugar," 14 I. C. C. Rep., 619. It appeared in the course of that inquiry that the Pennsylvania Railroad Company has a wharf in Brooklyn immediately adjoining the Brooklyn Eastern District Terminal, a property of the Havemeyers, who were said to be closely affiliated with the American Sugar Refining Company. This dock will be considered later in this report. It will suffice at this point to say that in the investigation referred to the freight-traffic manager of the Pennsylvania Railroad Company frankly admitted that his company, notwithstanding the proximity of its own dock, had made the Brooklyn Eastern District Terminal its terminal also, and in order to get a share of the sugar tonnage of the Havemeyer

refinery had agreed to pay lighterage allowances on sugar shipped from that dock. Defining the transaction in the plainest terms, the Pennsylvania Railroad Company simply purchased its part of the traffic of that very extensive shipper; and in view of the allowances then being made by other carriers it could get a portion of the tonnage in no other way. This matter, as well as the fact that the original allowances given to the Arbuckle Brothers were limited to sugar and coffee, the commodities in which they deal, are here recalled for the purpose of emphasizing what seems to be clearly established by the records of the Commission, namely, that the allowances were originally extended to these large shippers in order to put them on a preferred basis. It was not until after the regulating body had been strengthened by additional legislation that the two docks seem to have been designated in the published tariffs of the defendants as railway terminals and were thus made to subserve the convenience of such of the general shipping public in Brooklyn as might be able to use them.

These dock properties may make convenient terminals for a substantial amount of general traffic, but it is somewhat singular that with the entire Brooklyn River front available, and much of it equally convenient, the two docks, one directly owned by Arbuckle Brothers and the other by persons having supposedly very close relations with the American Sugar Refining Company, apparently the only sugar refineries now in operation in

Brooklyn, should have been selected for railroad terminals. The explanation lies undoubtedly in the fact that sugar moves west bound from New York City in larger volume probably than any other commodity; indeed, we are recently advised in another connection by the well-informed general counsel of one of these defendants that sugar constitutes almost one-third of all the traffic moving westward from that point of origin. If this estimate is even approximately accurate, it was a traffic that skillful shippers could readily turn to their advantage under the demoralized conditions prevailing when these allowances were first paid. Under the better conditions now generally prevailing it is a traffic that the defendants ought to be prepared to receive and handle with their own facilities. But, instead of acquiring or renting these or similar dock properties and operating them as terminals with their own employees, they have contracted for their operation by these great shippers and interests that are closely allied with great shippers. And, notwithstanding the very extensive fleet of tugboats and barges owned and used by the defendants in the harbor of New York, contracts have also been made with the private interests that own the two docks to do the lightering. It is impossible to conclude on all the information before us that these continued relations between the defendant carriers and great shippers and interests closely allied and largely identified with great shippers are wholly disinterested, however much of a convenience

the docks may now be to some of the general shipping public.

That the sugar refiners had in mind traffic advantages for themselves is further shown by the fact that the allowances, even after the Elkins law was passed, were based not on the cost of the service rendered by the Arbuckle Brothers, but on the length of the haul by the railroad companies. Because the railroad companies got more on a long haul than on a short one they paid more to the refiners, although the service rendered by the refiners was the same whether the railroad haul was long or short.

The contracts of Arbuckle Brothers with the several railroad companies relative to the Jay Street Terminal are, as stated in the bill of complaint of the railroad companies (R., 4, 5), "substantially identical in their terms and provisions," and as Arbuckle Brothers are the agents of all the companies, there must necessarily be some understanding as to the allotment of business to the different companies, as only so could one agent serve so many masters. By section 15 of the contracts (R., 19) the railroad companies agree not to establish except under legal compulsion any freight stations in the prescribed territory over which Arbuckle Brothers assume to be sovereign, and by section 17 (R., 19) Arbuckle Brothers agree that each company "shall have and enjoy during the life of this contract all rights and privileges granted to any other railroad by said Terminal Company [Arbuckle Brothers] upon as favorable terms, with respect to allowances or otherwise,

as granted to any other railroad company, anything herein to the contrary notwithstanding."

Here are unified tactics as to traffic, comprehending every railroad serving the territory and insuring to Arbuckle Brothers advantages in the sugar business against which, without similar advantages no rival could successfully contend for the western trade.

The situation of the Federal Company.

Under the conditions disclosed it would be vain for any person proposing to engage in the business of refining sugar to locate in the neighborhood of the Jay Street Terminal which, as the bill alleges, "serves the shippers of a large and important manufacturing and shipping territory, including about one-third of the densely populated part of Brooklyn." Locating there, the refiner must expose his business to the view and submit it to the handling of his competitors, the Arbuckle Brothers. He could not there establish a shipping plant of his own which would be on an equality with that of Arbuckle Brothers—that is, be accepted by the railroad companies as one of their own freight stations at which they accepted the sugar for shipment at the New York rate—for the railroad companies had contracted with Arbuckle Brothers that tney would not, "unless legally compelled to do so, establish or maintain any freight stations" in that vicinity. To avoid the espionage and domination of Arbuckle Brothers, the Federal Sugar Refining Company when it entered upon business must establish itself elsewhere, and it went to Yonkers on the east bank of the Hudson. From this place it can ship its

sugar to many of the points, but not all of them, served by the railroad companies, and have free lighterage across the harbor as part of the through route, by shipping via the New York Central. But shipping in this way involves passage through New York City, and is subject to such delays as to make it impracticable. The expense to the railroad companies is much greater than the expense of lighterage from Yonkers, but the service is of no practical value.

So the Federal Company engaged the Ben Franklin Transportation Company to lighter the sugar direct to the Jersey terminals from Yonkers, but then the railroad companies refused to make it the lighterage allowance made to the Arbuckle Brothers. They could get that allowance, or its equivalent, free lighterage, if they did their business in a way that would leave to Arbuckle Brothers an immense advantage in the matter of time, but if they did it precisely as Arbuckle Brothers did it, lighter it themselves from the refinery to the railroad terminals, they must pay the cost, while Arbuckle Brothers were reimbursed that cost. The sole attempted excuse for this was that the Federal Company of Yonkers was without the free lighterage limits.

As we have shown, this excuse was a mere pretext, for none of the railroad companies lightered sugar, on a free basis or otherwise. Aside from this, the lighterage limits were immaterial, unless the expense of lightering from without the limits was greater than the expense of lightering from within.

The limits must be reasonably determined, otherwise they could be made the means of the most arbitrary discrimination. Lighterage from Yonkers is done by outside lighters at the rate prevailing within the free limits and for less than the allowance made to Arbuckle Brothers.

The complaint of the Federal Sugar Refining Company, of Yonkers, made to the Interstate Commerce Commission against the railroad companies, was dismissed, the Commission standing four to three, because it was not within lighterage limits.

A few days after this complaint was filed a new corporation was formed which was called the Federal Sugar Refining Company. The words "of Yonkers," which were part of the name of the old company, were omitted from the name of the new corporation. The new company took over the business of the old one. When the Interstate Commerce Commission rendered its decision dismissing the complaint, the new company undertook to bring its shipments within the rule announced as to the lighterage limits. The method adopted was to consign its sugar from Yonkers to itself at its head office in Manhattan and upon notice of arrival at pier 24, the regular landing place of the Ben Franklin Transportation Company, to issue a new bill of lading showing the Federal Company, Manhattan, to be the consignor. When the captain of the lighter gets this new bill of lading he proceeds with his cargo to the Jersey terminals and delivers it to the railroad companies, who issue their bills of lading therefor.

Now, said the new Federal Company, we ship from within the free limits, and as we do the lighterage ourselves, just like Arbuckle Brothers, we want the same allowances on our western shipments which are made to the Brothers on lighterage account. The railroad companies refusing, complaint was again made to the Commission, and now relief was granted and the order granting that relief is the object of attack in this suit.

The change in the mode of doing the lighterage—that is, the shipping and rebilling at pier 24—is said to be a mere artifice and subterfuge, and that practically and essentially there has been no change.

Now, as a matter of fact, there has been change enough to bring the Federal Company within the lighterage rule as to its shipments. It has its sugar at pier 24, and how it got there is no concern of the railroad companies. This court decided in Interstate Commerce Commission *v.* D., L. & W. R. R. Co. (220 U. S. 235) that the carrier could not make the ownership of commodities the test of its duty to carry them or the criterion of the rates for carriage. For the same reason the carrier may not inquire as to the place of origin and base its rates upon that. The sugar of the Federal Company was at pier 24 in New York City, and it was lightered across the harbor to the railroad terminals for shipment to the west. To denounce the billing from Yonkers to the pier, the stopping at the pier, and rebilling from there as an artifice and a subterfuge is to denounce as a flimsy pretext the reason given for

the original discrimination against the Federal Company.

It is not necessary to pursue this subject, for the Commission did not base its action on this changed mode of business by the Federal Company. It accepted the company's contention that it now lightered its sugar from pier 24 to the railroad terminals, but declined "entering upon any discussion of the importance of the fact in the disposition of this proceeding." The Commission in fact overruled its first decision, and did so upon the merits; and it is in that view that we seek to sustain its action. The order on the first petition was wrong, and the order on the second petition was right. The first petition was dismissed without prejudice, and so the second petition might have been heard upon its merits even though presented by the same corporation and upon the same facts. And more than this, the order on the first petition was set aside and a rehearing granted.

The case was one peculiarly for the jurisdiction of the Commission. Here was a state of facts to be considered, and the determination to be made respecting it was one not of law but of fact. Whether the conditions of shipment were substantially the same was here clearly a matter of fact, and so, too, whether the allowance to Arbuckle Brothers, denied to the Federal Company, was an actual discrimination in favor of the one and against the other.

In the recent case of *Union Pacific Railroad Company* v. *Updike Grain Company et al.* (222 U. S. ——), this court held that a carrier could not make rules

which discriminated between shippers standing in substantially the same relation to it. The Union Pacific Company desired to have the cars in which it brought grain to its eastern terminals promptly unloaded, and as a consideration for prompt unloading made an elevation allowance. It required, however, that the cars so unloaded be returned to it within a specified time. This could be done by elevator companies doing business on its tracks, both as to its own and foreign cars. It could not be done by elevator companies operating upon other tracks though connected with the Union Pacific tracks, as to foreign cars, for, under a rule which the Union Pacific had helped to establish, these cars must be returned to the proprietary company. The court said:

> For elevating grain from like foreign cars the Peavey Companies were paid because their elevators happened to be located on the Union Pacific tracks. But if the rule is valid against the plaintiffs, it would put it in the power of the carrier to say which elevator should be paid, and which not paid, for performing the same transportation service. It could load grain belonging to the plaintiffs into foreign cars, and in spite of the service rendered by them to the carrier in unloading, no payment would be made, because these foreign cars, under the rule, were not returned to the Union Pacific. It is not necessary that any such improper purpose should be shown to exist. It might have existed, and if so, could not be proved by the injured party. The power to make such a discrimination

> would prevent the enforcement of any regulation frequently having such operation.
>
> The carrier cannot pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service. To receive the benefit of such work by one elevator without making compensation therefor would, in effect, be the involuntary payment by such elevator of a rebate to the railroad company, for it would enable the railroad to receive more net freight on its grain than was received from its competitor located on the railroad's tracks. This cannot be directly done, nor indirectly by means of regulation. A rule apparently fair on its face and reasonable in its terms may, in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another similarly situated cannot avail himself.

The railroad companies here dealing with similar conditions have by their own action undertaken to create dissimilarity. Follow a shipment of sugar from the Arbuckle refinery, from the refinery to its destination in a western State, and in like manner one from the Federal refinery, and there is no difference discernible by the eye except that one comes from down the river and the other from above. In each case the sugar is loaded into the lighter by the owner, and in each case the lighter is furnished by the owner and operated by him or his agents employed for that purpose. In each case the owner delivers the sugar to the railroad company at its Jersey terminal, and in each case the company there

receives it and hauls it to destination. In each case the refiner renders the same service to the carrier, and the carrier renders the same service to the refiner. The distinction between lightering sugar in bags and lightering loaded cars is of no significance. The allowance to Arbuckle Brothers is not based upon that, and that was never considered until the necessity arose for justifying what was on its face a bald discrimination.

The order of the Commission requires only that Arbuckle Brothers pay to the railroad companies what the Federal Company must pay for the same service, or that the railroad company pay to the Federal Company what it pays to Arbuckle Brothers for the same service.

It is respectfully submitted that the decree of the Commerce Court should be reversed, and the case should be remanded with directions to dismiss the bill.

F. W. Lehmann,
Solicitor General.

January, 1912.

o

17

Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, AND THE FEDERAL SUGAR REFINING COMPANY,
Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, ET AL.,
Appellees.

In Equity.
No. 722.

BRIEF FOR RAILROAD COMPANIES, APPELLEES.

GEO. F. BROWNELL AND
HERBERT A. TAYLOR,
Solicitors for the Railroad Companies, Appellees.

New York, January 5, 1912.

or

To be argued by
GEO. F. BROWNELL
for the Railroad Companies,
Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1911, No. 722.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, and THE FEDERAL SUGAR REFINING COMPANY,
Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *et al.*,
Appellees.

BRIEF FOR RAILROAD COMPANIES, APPELLEES.

Statement.

This is an appeal from an order of the Commerce Court, filed May 22, 1911 (Record, pp. 125-126), granting a temporary injunction restraining the enforcement of an order of the Interstate Commerce Commission (hereinafter referred to as the "Commission").

The order of the Commission was made on December 5, 1910, in the case of the Federal Sugar Refining Company

against The Baltimore and Ohio Railroad Company *et al.*, (Record, p. 67). The order in question notified and required the several railroad companies, petitioners below, to cease and desist on and after April 15, 1911, and for a period of not less than two years thereafter abstain, from paying certain "allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowances" to the Federal Sugar Refining Company on its sugar. Subsequently the effective date of its order was extended by the Commission to June 1, 1911.

The several railroad companies, appellees, filed their petition in the Commerce Court against the United States to set aside and annul the order of the Commission. The Federal Sugar Refining Company, the complainant before the Commission, was granted leave to intervene, as were also the Brooklyn Eastern District Terminal, a corporation, and the Jay Street Terminal and Arbuckle Bros. copartnerships, in which John Arbuckle and William Jamison are the copartners, conducting separate businesses in the two copartnerships, all of these intervenors being parties interested in securing the annulment of the Commission's order.

A motion was made upon notice for a temporary injunction restraining the enforcement of the said order. This motion was made upon the petition filed in the case, and the affidavits attached to the notice of motion together with the testimony and proceedings had before the Commission (Record, p. 72). The evidence before the Commission was, however, excluded on the hearing by order of the Commerce Court (Record, p. 123). The defendant and the intervening defendants filed motions to dismiss the petition which were extended by order of the Commerce Court to cover the intervening petitions of Jay Street Terminal, Arbuckle Brothers and the Brooklyn Eastern District Terminal (Record, p. 122). The motion for a temporary injunction was heard by the Commerce Court upon the petition of the railroad companies, the affidavits attached to their notice of motion and the intervening petitions

of the Brooklyn Eastern District Terminal and of Jay Street Terminal and Arbuckle Brothers.

The respondents below filed no affidavits.

The case, therefore, comes before this Court upon appeal with all the facts set forth in the petition, affidavits and intervening petitions admitted (Angle vs. Chicago, St. Paul, etc., Ry., 151 U. S., p. 1, at p. 10).

Detailed Statement of Facts and Proceedings.

The Federal Sugar Refining Company has a refinery at Yonkers, N. Y., and Arbuckle Brothers have a refinery in the Borough of Brooklyn, New York City (Record, pp. 6-7). The Railroad Companies operate what are known as trunk line railroads, extending from New York to western and southern points. In order to receive and deliver freight in New York City they are obliged to transport the same across the waters of New York Harbor on lighters by what is called lighterage service, or when the freight is carried through in railroad cars, on car floats by what is called floatage service.

At numerous points along the water front within the lighterage limits they have established public staitons, thus extending the "railroads" of the Railroad Companies to New York City under the definition of "railroads" in Section 1 of the Act to Regulate Commerce.

They have also established boundaries known as "lighterage limits" including substantially all of what may be called the manufacturing and commercial portion of the water front of New York City and the opposite shore of New Jersey and within these boundaries they receive and deliver freight at any accessible point on the water front without any additional charge above the New York rates, which are generally speaking the same as the rates to and from the terminals on the New Jersey shore. At "public" docks open to any vessel, the

railroad pays the wharfage; at private docks the shipper or consignee must arrange for the necessary dockage.

At a number of points in the Boroughs of Brooklyn and the Bronx, the Railroad Companies or some of them furnish public stations through arrangements made with Terminal Companies to furnish union public stations and terminal facilities for the receipt and delivery of freight in cars and through freight houses, and for the transportation of such freight between such terminal stations and the Railroad Companies' rails on the western shore of the harbor all of which is done for and in the name of the Railroad Companies under provisions of their tariffs filed with the Interstate Commerce Commission under which their New York rates apply to and from such union public stations (Record, pp. 3–5).

One of these public terminal stations, known as the Jay Street Terminal, is owned and operated by William A. Jamison and John Arbuckle, conducting a separate business in that respect as copartners under the name and style of "Jay Street Terminal" in accordance with the Laws of the State of New York. Jay Street Terminal is named as a station of the Railroad Companies, appellees, in their respective tariffs, and is conducted under contract with the Railroad Companies like any other freight station (Record, p. 15, ff.), bills of lading being issued from and to it on behalf of the Railroad Companies and in their names, on the regular uniform form, charges being collected and accounts kept, the Jay Street Terminal performing the entire physical and clerical service, and furnishing the necessary docks, freight yard and station buildings and equipment excepting cars. The Jay Street Terminal also floats or lighters all shipments between the Terminal and the rails of the Railroad Companies on the New Jersey Shore. For these services and facilities each Railroad Company pays to the Jay Street Terminal an aggregate compensation figured on the freight handled for it, based on the rate of 4 1/5 cents per hundred pounds on freight originating at or destined to points at or

west of the westerly limits of Trunk Line Territory, so-called, and three cents per hundred pounds on freight originating at or destined to points east of the westerly limit of Trunk Line Territory. The same amounts per hundred pounds are paid to other terminal companies furnishing similar service at New York (Record, pp. 4–6).

The refinery of Arbuckle Brothers, a copartnership composed of William A. Jamison and John Arbuckle, is within two blocks of the Jay Street Terminal and they truck sugar from their refinery to this terminal and load it into cars at their own expense and deliver it to the Jay Street Terminal and obtain the Railroad Company's bill of lading for it from the Jay Street Terminal just as other shippers do with other freight (Record, p. 6).

The refinery of the Federal Sugar Refining Company at Yonkers, N. Y., formerly operated by the Federal Sugar Refining Company of Yonkers, is located on the Hudson River, ten miles north of the limits of the lighterage limits. The sugar manufactured at this refinery and shipped over the lines of these appellees is loaded onto lighters of the Ben Franklin Transportation Company, an independent boat line with which the Federal Sugar Refining Company has made a contract, under which the boat line lighters its sugar to the terminals of the Railroad Companies for three cents per hundred pounds. The boat line brings the sugar to the terminals of the railroads on the western shore of New York Harbor and delivers it to them for rail transportation (Record, p. 7).

The Federal Sugar Refining Company's refinery at Yonkers is located directly on the tracks of the New York Central and Hudson River Railroad Company. Over this railroad the rates to the points in the shipping territory of the Federal Sugar Refining Company are with few exceptions the same as the rates via the lines of these appellees. To ship at the New York rate over the lines of these appellees, the Federal Sugar Refining Company can deliver its shipments to the New York Central and Hudson River Railroad at Yonkers, thence to be transported by that rail-

road to New York and there delivered to the appellees within lighterage limits. None of the appellees have lines extending to Yonkers. Because of alleged delay in the handling and transportation of shipments via this route, the Federal Sugar Refining Company sometimes prefers to deliver said shipments by lighter to these appellees at their stations on the New Jersey shore of New York Harbor (Record, p. 7).

Prior to July, 1909, these shipments were carried by the Ben Franklin Transportation Company directly to the rail terminals on the Jersey shore from Yonkers without stop. Since that date the lighters stop enroute at Pier 24, North River. The reason for stopping at Pier 24 is found in the decision made by the Commission in case No. 1082, brought by the Federal Sugar Refining Company of Yonkers, the predecessor of the Federal Sugar Refining Company, against the same Railroad Companies appellees here (17 I. C. C., 40; Record, p. 24). The complaint in that proceeding claimed a discrimination against the Federal Sugar Refining Company of Yonkers and in favor of the Jay Street Terminal and the Brooklyn Eastern District Terminal, an incorporated company operating a similar terminal station in another section of Brooklyn, because of the refusal of the Railroad Companies to pay it the same amounts on account of the lighterage performed by the Ben Franklin Transportation Company from Yonkers to the rail terminals of the Railroad Companies on the western shore of New York Harbor as were paid to the two Terminal Companies above named on account of the various services performed and terminal facilities furnished by them in connection with the transportation of sugar shipped by Arbuckle Brothers and the American Sugar Refining Company, respectively. This complaint was dismissed on the ground that the relief prayed for would, in effect, require the Railroad Companies to extend their lighterage service to Yonkers, and that the act to regulate commerce did not require them to do so, though their lines extended

to public stations in New York City, reached by ferries, car floats or lighters, and although they had seen fit as a matter of business discretion to extend their transportation service to docks within lighterage limits under their lighterage regulations (Record, p. 24, ff.).

As a result of this decision of the Commission the lighters of the Ben Franklin Transportation Company were stopped enroute from Yonkers to the terminals of the Railroad Companies at Pier 24, North River, where certain formalities with reference to shipping orders were had for the purpose of making it appear as a matter of law that these shipments were made not from Yonkers, but from Pier 24, North River, a point within lighterage limits (Record, p. 8). A new complaint was filed with the Commission setting forth the same grounds of discrimination as the prior one, but on the theory that the decision of the Commission did not apply because the shipments of the Federal Sugar Refining Company were now lightered from Pier 24, a point within lighterage limits and not from Yonkers. The Commission held as a matter of law, that the stoppage of the lighters of the Ben Franklin Transportation Company for instructions at Pier 24, differentiated the case from the former one and made the following order:

> "It is ordered that the above-named defendants (the appellees) be and they are hereby, notified and required to cease and desist on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain from paying such allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowance to said complainant (Federal Sugar Refining Company) on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce." (Record, pp. 67–68).

The so-called "allowances" referred to in this order are

a part of the payments making up the compensation of the Jay Street Terminal, figured at the rates of three cents and 4 1/5 cents per hundred pounds as above described.

This is the order which has been temporarily enjoined by the Commerce Court.

The first complaint of the Federal Sugar Refining Company of Yonkers to the Interstate Commerce Commission alleged violations of Sections 1, 2, 3 and 15 of the Act to Regulate Commerce (Record, p. 22).

The allegation as to Section 15 was doubtless intended to refer to the provision that a charge and allowance to the owner of property transported, for any service connected with or instrumentality used in such transportation shall be no more than just and reasonable, and to raise the question whether the payments by the Railroads to Jay Street Terminal and Brooklyn Eastern District Terminal were in violation of this provision.

This issue was eliminated by the Commission's first opinion and report to the effect that the payment to Jay Street Terminal was not more than just and reasonable and did not exceed the authorized measure of compensation (Record, pp. 25 and 32). Any question as to payments to the Brooklyn Eastern District Terminal was "virtually waived on the hearing" on the first complaint (Record, p. 31; see also Record, p. 60), that Company appearing not to have any substantial relationship with any shipper.

The second complaint, in which the order now an issue was made, does not attempt to revive the question as to the reasonableness in amount of the payment to the Jay Street Terminal, and alleges no violation of Section 15 of the Act to Regulate Commerce nor does the Commission find any (Record, pp. 40 and 51). This second complaint alleges violation of Sections 1, 2 and 3 of the Act to Regulate Commerce (Record, p. 40).

The Commission does not state its conclusions (as required by Section 14 of the Act to Regulate Commerce), and has not framed its order, with such definiteness as

clearly to inform us what section of the Act, in its opinion, the Railroad Companies have violated.

It is clear, however, both from the report of the Commission and its order that it does not find any violation of the requirement of Section 1 that rates shall be *reasonable.* The report excludes that question as not before the Commission (Record, p. 60). The order is also not responsive to any such conclusion as it fixes no new rate available to all shippers. The report and order also show that no violation of Section 1 is found on account of failure to provide and furnish transportation upon reasonable request, etc., for the Railroad Companies stand ready to perform themselves every service for the Federal Sugar Refining Company that the Jay Street Terminal performs on shipments made by Arbuckle Brothers. Nor does the order require the performance of any service. No other portion of Section 1 seems in anywise applicable.

It is clear then that the violation found to exist, in the opinion of the Commission, is of either Section 2 or Section 3 or both.

Section 2 defines and prohibits *unjust* discrimination, Section 3 prohibits *undue* or unreasonable *preference* or *advantage*, *prejudice* or *disadvantage*.

In its report the Commission repeatedly refers to *undue* discrimination, generally in connection with references to preference or advantage, prejudice or disadvantage or what it calls "inequalities" (Record, pp. 44, 52 and 55). We find no specific conclusion that there was *unjust* discrimination in violation of Section 2 either in the report or in the order In the order it is recited that the Commission has found that the Railroad Companies "*unduly* discriminate" and "unduly prefer" and that "said allowances so paid to Arbuckle Brothers" are "unduly discriminatory" and in violation of the Act to Regulate Commerce,

This loose use of the statutory terms, commingling and reversing the application of the qualifying words, makes its impossible to determine definitely whether the Commission has concluded that the Railroad Companies are guilty of violating Section 2 or Section 3 or both.

Under the well established rule Section 2 applies to cases of discrimination between shippers from the same point over the same line, for the same distance and under the same circumstances of carriage (I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., 144). To show an unjust discrimination forbidden by Section 2 in this case Arbuckle Brothers must be shown to be shippers from the stations of the Railroad Companies on the Jersey shore because the Federal Suger Refining Company so far as shipping over the lines of the Railroad Companies is concerned obviously makes its shipments from the stations on the Jersey shore. The Railroad Companies do not have anything to do with the shipments of the Federal Sugar Company before receipt at such New Jersey stations.

There is apparently no definite "conclusion" or "finding" in the Commission's report to the effect that Arbuckle Brothers are shippers from stations on the Jersey shore as distinguished from the Jay Street Terminal in Brooklyn. The Commission states, upon this subject (Record, p. 53):

> "The complainant contends that in lightering their sugar to the Jersey shore and there delivering it to the defendants, Arbuckle Brothers perform what the complainant refers to as a purely accessorial service. We *incline to think* this is a sound view of the matter. * * * It is only when the defendants actually accept and physically take possession of the sugar at their receiving stations west of the river that they agree to, and do in fact assume the liabilities of common carriers with respect to the sugar of Arbuckle Brothers. Much, therefore, *may be said* in support of the *theory* that at that point and at that moment is the relation of shipper and carrier between the defendants and Arbuckle Brothers actually established, and that only at that moment of time do the mutual liabilties and responsibilities attending that relation spring into being."

And, again, (Record, p. 55):

> "We have therefore been *inclined*, as heretofore, stated, to regard the lightering of their own sugar across the river as an accessorial service by Arbuckle Brothers from their private dock, and not as a service of transportation from a public receiving station of the defendants. * * * It is not necessary, however, to draw fine distinction between an accessorial service and a service of transportation, as applied to the facts in this case. If the allowances made by the defendants subject the complainant to an undue discrimination or give Arbuckle Brothers, their competitors, an unjust preference, a wrong is being done that must be remedied by an appropriate order, whether the allowances are paid for as for an accessorial service or for a service of transportation."

It might be assumed, therefore, that the Commission's order is not based on any conclusion that Section 2 is violated, but the argument in support of the Commission's order is based on the claim that the Commission did conclude that the sugar shipped by Arbuckle Brothers was delivered to the Railroad Companies for transportation only on the Jersey shore; that the payments to Jay Street Terminal were for purely accessorial services, and constituted a violation of Section 2; and that the order of the Commission was, in part at least, based thereon (Commission's Brief, 27, 30, 31, 43, 49).

Therefore, we attempt to show, as we did below, that any conclusion of the Commission to the effect that Arbuckle Brothers were shippers from the stations of the Railroad Companies on the Jersey shore would be erroneous in law and that there was no violation of Section 2; also that the order of the Commission was not appropriate, and not within the powers granted to it, for the purpose of remedying any such alleged violation of Section 2.

Assuming that the Commission concluded that there

was a violation under Section 3, similar questions arises as to whether under the facts there was in law any undue or unreasonable preference or advantage, prejudice or disadvantage such as to empower the Commission to make an order, or whether there were different circumstances and conditions which in law removed any disadvantage to which the Federal Sugar tRefining Company may have been subject, from the operation of Section 3, also whether the order of the Commission is in form and substance such as it is authorized to make to prevent violation of Section 3.

POINTS.

I.

The order of the Commission was beyond its power and was properly enjoined by the Commerce Court because:

1. The Federal Sugar Refining Company has not the status of a shipper from New York within lighterage limits; there is a single continuous shipment of sugar by boat from Yonkers to the Jersey Shore and no new shipment originating at Pier 24.

2. The order in effect requires these appellees to extend their lines to Yonkers by requiring them to pay more than the cost of bringing the Federal Sugar Refining Company's shipments from Yonkers.

3. The service performed by the Ben Franklin Transportation Company for the Federal Sugar Re-

fining Company is not a transportation service of the Railroad Companies but is wholly accessorial and cannot lawfully be paid for by these appellees.

4. The service performed for the Railroad Companies by the Jay Street Terminal is a transportation service as to sugar shipped by Arbuckle Brothers as well as other shipments, and is not an accessorial service. Arbuckle Brothers are therefore shippers over the lines of the Railroad Companies from Jay Street Terminal station in New York City, not from stations on the New Jersey shore. There can be, therefore, no violation of Section 2 of the Act to Regulate Commerce.

5. The appellees may lawfully employ the Jay Street Terminal to furnish public station and terminal facilities without being compelled to make payments to the Federal Sugar Refining Company on its shipments at the same rate per hundred weight as paid to the Jay Street Terminal.

II.

The Commerce Court did not err in issuing its order restraining the enforcement of the Commission's order *pendente lite* because

1. The case presented to the Commerce Court showed the Commission to have made an order based upon errors of law and beyond its power and was a proper case for the exercise of the power granted to the Court to suspend the enforcement of an order of the Commission *pendente lite*.

2. Irreparable damage would have resulted to these appellees if the order of the Commission had not been enjoined.

3. It was not necessary for the Commerce Court to incorporate in its order a specific finding that irreparable damage would result to these appellees.

ARGUMENT.

I.

The Federal Sugar Refining Company has not the status of a shipper from New York within lighterage limits, there is a single continuous shipment of sugar by boat from Yonkers to the Jersey Shore and no new shipment originating at Pier 24, North River.

This point is treated first because the order of the Commission is based on the theory that the Federal Sugar Refining Company is a shipper from a point within lighterage limits, namely, Pier 24, North River, otherwise the Federal Sugar Refining Company would have to be regarded as a shipper from Yonkers, in which case the Commission concededly could not make an order requiring an allowance to be paid to the Federal Sugar Refining Company whether as a condition of payments to the Jay Street Terminal or otherwise, as more fully discussed below.

The point of distinction between the case presented by the second complaint of the Federal Sugar Refining Company and the first petition is explained by Commissioner Harlan in the Commission's report as follows:

> "Under the arrangement in effect at the time its first petition was before us, the sugar was

lightered by the Ben Franklin Transportation Company directly from the complainant's dock at Yonkers to the defendants' freight depots on the Jersey shore. But since our report in that proceeding was announced the method of handling the traffic has been changed and the arrangement upon which this complaint is based was agreed upon and carried into effect by the two companies." (Record, p. 47).

A statement is then made in the Commission's report of the details of this arrangement and the conclusion is reached that the shipments of sugar lightered from Yonkers to the rails on the western shore of the Hudson River with the stop enroute at Pier 24, North River are as a matter of law, new shipments from Pier 24 to the terminals of these appellees. This conclusion is stated in the following language:

> "On the record in the former proceeding, as heretofore explained, it appeared that the lighterage movement commenced at Yonkers which is outside the lighterage limits. On the record now before us the complainant contends that the lighterage movement to the receiving stations west of the river commences at Pier 24, where the complainant gives its shipping instructions to the lighterage company. Without entering here upon any discussion of the importance of the fact in the disposition of this proceeding, it will suffice to say that we accept the complainant's contention that the sugar is now being lightered to the defendants at Jersey City from Pier 24, which is inside the lighterage limits" (Record, p. 48).

The facts concerning the transportation of the sugar of the Federal Sugar Refining Company from its refinery at Yonkers to the stations of these appellees on the western shore of New York Harbor, with a stop of the lighter en-

route at Pier 24, North River, are undisputed, and were in fact stipulated by the parties.

After the decision of the Commission on the first complaint, holding that it was not an unlawful discrimination for the Railroad Companies to refuse to pay for the lighterage of sugar from Yonkers while paying the Jay Street Terminal for floating the sugar of Arbuckle Brothers from Brooklyn to their terminals on the western shore of the Hudson River, the Federal Sugar Refining Company adopted the following practice for the purpose of making it appear that its shipments originate at Pier 24, North River, which is a point within lighterage limits.

The Federal Sugar Refining Company has its principal office at 138 Front street, New York City. When sales contracts for sugar are received by it, they are given serial contract numbers, and an order bearing a serial contract number is sent to the refinery at Yonkers to be filled. The barrels or bags of sugar are stamped with the contract number of the order they fill. The shipment bearing the contract number remains intact until it reaches the purchaser of the sugar (Record, p. 8).

Shipping instructions are also sent by the office at 138 Front street to the refinery, showing the contract number, the ultimate destination of the sugar, and the rail line over which the shipment is to be transported. The shipment is placed on board the lighter of the Ben Franklin Transportation Company and the captain of the lighter gives a receipt which shows that he has received so much sugar in good order. It is not a bill of lading and does not specify what the terms of shipment are, the rate or the point of delivery, or the person to whom delivery is to be made. It is a bare receipt acknowledging the receipt of so much sugar in good order and nothing more The captain of the lighter receives from the refinery a railroad bill of lading form filled in by the Federal Sugar Refining Company, designating a consignment to the Federal Sugar Refining Company, 138 Front street, New York City, to be transported by the Ben Franklin Transporta-

tion Company and showing the contract number with which the shipment has been marked. This document is not signed by the representative of the Ben Franklin Transportation Company, nor does it call for transportation to or delivery at Pier 24, North River, a part of which is leased to the Ben Franklin Transportation Company.

After the lighter has been stopped at Pier 24, North River, the captain calls up the office of the Federal Sugar Refining Company at 138 Front street and reports the particular shipment then on his lighter. The captain of the lighter is then given a form of railroad bill of lading showing the name and address of the consignor as the Federal Sugar Refining Company, 138 Front street, New York, Franklin street, Pier 24, North River. The lighter then proceeds across the river to the New Jersey rail terminus of such of the railroad companies as had been previously designated in the shipping instructions sent to Yonkers and there delivers the shipment to such railroad company and obtains the signature of the agent of the railroad company at the terminus upon the form of bill of lading, which bill is stamped by the agent to show the receipt of the shipment at the railroad company's terminal station on the west shore of New York Harbor (Record, pp. 8–9).

These shipments are handled by the Ben Franklin Transportation Company under a contract with the Federal Sugar Refining Company, providing for the payment of 4 cents per hundred pounds for lightering sugar from Yonkers to Pier 24, North River, and only 3 cents from Yonkers to the terminals of these railroad companies on the west shore of the Hudson. The Ben Franklin Transportation Company still receives only 3 cents per hundred pounds for lightering the sugar the entire distance from Yonkers to the New Jersey railroad stations via Pier 24, being the same compensation received by it when it formerly lightered the sugar directly from Yonkers to those terminals without this intermediate stop (Record, p. 9). The 4 cent lighterage charge on shipments to be delivered at Pier 24 presumably covers the delivery on the pier of

such local shipments which the Ben Franklin Company provides for shipments.

The practice above outlined of having the lighters of the Ben Franklin Transportation Company stop enroute from Yonkers to the terminals of these appellees, at Pier 24, North River, was admittedly and avowedly a device and subterfuge established by the Federal Sugar Refining Company for the purpose of making the lighterage from Yonkers to these appellees' terminals appear to be, as a matter of law, two distinct transportation services, one from Yonkers to Pier 24, and the other from Pier 24 to the terminals on the west shore of the Hudson, and thus to make the shipment one originating at Pier 24 within the ruling in the case of Gulf, Colorado and Santa Fe Railway Company against Texas, 204 U. S., 403.

That case involved the question of whether a shipment transported from Texarkana to Goldthwaite in the same State was an interstate shipment as between those points because it had been shipped in the first instance from a point outside the State to Texarkana and reshipped (after five days but without unloading), to Goldthwaite. This Court held on the facts in that case that the shipment from Texarkana to Goldthwaite was a separate transaction, not interstate, but subject to the laws of the State.

The first thing to be noted in connection with the case referred to is that this Court treated the question of whether the case involved a single transportation transaction or two separate transactions as a question of law. This is obvious from the fact that this Court stated that the facts as found by the Court below were conclusive upon it, but nevertheless proceeded to consider at length the question referred to and to pass upon it.

It was held that whether or not there were two separate transactions of transportation depended on the terms of the contract; as the Court said, "The transportation * * * follows the contract of shipment, until that is changed by the agreement of owner and carrier" (p. 412). To determine the nature of the contract

an examination of the facts was made and it was found, that there was a contract for transportation from Hudson, South Dakota, to Texarkana; that neither shipper nor consignee changed or offered to change the contract of shipment or place of delivery; that the consignee accepted the shipment at Texarkana, the place of delivery; that the first contract was thus completed, and that the first carrier afterward by direction of the owner turned the shipment over to another carrier to be carried forward to Goldthwaite under a new contract covering only transportation between those points and evidenced by a new bill of lading to that effect (p. 412). The shipment lay five days at Texarkana before it was reshipped (p. 413).

The transaction under consideration here was diametrically opposite to that in the Texarkana case in each of the decisive particulars mentioned

There was no contract between the Ben Franklin Transportation Company and the Federal Sugar Refining Company for the transportation of the sugar in question from Yonkers to Pier 24.

The written evidences of the nature of the actual contract are the receipt given by the Ben Franklin Transportation Company and the agreement fixing the rate of its compensation, the latter being considered in connection with the amount of compensation actually paid under it.

The receipt in every case was a bare receipt (Record, p. 8). It did not contain any conditions to relieve the Ben Franklin Transportation Company from any measure of liability on tender at any particular place, and so far as the receipt itself was concerned it put the Ben Franklin Transportation Company in the position of a continuous carrier to whatever ultimate destination it might finally carry the goods until the actual delivery thereof out of its hands irrespective of how many changes in shipping directions the Federal Sugar Company might give, to that extent the bare receipt is evidence against the existence of separate contracts for transportation to and from Pier 24.

The agreement for the compensation of the Ben Franklin Transportation Company provided for a stated amount to be paid for lighterage and delivery of sugar at Pier 24, namely, four cents per cwt., and for a different compensation for sugar lightered to and delivered at railroad stations on the Jersey shore, namely three cents per cwt. (Record, p. 9). This written contract was not changed in 1909 when the new practice was adopted and the Federal Sugar Company continued as theretofore to pay three cents per cwt. for lighterage from Yonkers to your petitioners' terminals, in spite of the stop enroute at Pier 24, and did not pay the existing contract price for delivery at Pier 24. No separate price was ever agreed upon for the alleged separate service from Pier 24 to your petitioners' terminals.

This agreement as to compensation and the course of dealing thereunder thus show that the transportation from Pier 24 across the river was, even in 1909 and after, separate only as it might affect relations with the Railroad Companies and for its effect upon the Interstate Commerce Commission. The Sugar Company and the Ben Franklin Company did not treat it as a separate transaction between themselves.

The existence or scope of a contract depends on the actual relations between the parties, not on forms adopted for their effect on others.

The document delivered *to* the Ben Franklin Transportation Company at Yonkers *by* the Federal Sugar Refining Company (Record, p. 8) is incompetent as evidence of the nature of the contract between the Ben Franklin Transportation Company and the Federal Sugar Refining Company, because this document, which purports to be a bill of lading, was not issued or signed by the Ben Franklin Transportation Company, and the delivery of this document was not understood by the officers of either the Ben Franklin Transportation Company or of the Federal Sugar Refining Company to establish a separate contract for lighterage from Yonkers to Pier 24 or to

amount to shipping instructions from the Federal Sugar Refining Company to the Ben Franklin Transportation Company.

It is very clear that the use of this document was adopted as a lawyer's plan for giving the appearance of a separate contract for transportation from Yonkers to Pier 24, but that there was no such understanding by the parties to the contract of the purpose and intent of the plan as was necessary to constitute a meeting of the minds and the making of a contract of that sort.

The form of the document delivered to the Ben Franklin Transportation Company at Yonkers shows that it was a mere formality, which was not understood by the parties to affect the transportation contract. The form used was the uniform railroad bill, although the transportation to be performed was by boat line. It contained numerous provisions purporting to govern the liability of the carrier, applicable to railroad transportation and not to transportation by boat, and which were not understood to be accepted by the parties to the actual transportation contract. It was not signed by the Ben Franklin Transportation Company or any other carrier and contained the contract number identifying the shipment, which, taken in connection with the shipping instructions given to the refinery from the office at 138 Front Street, which contained the initials of one of the Railroad Companies in each case, shows that the shipment was actually made by the refinery from Yonkers to the Jersey shore station of one of these appellees (Record, p. 8).

It is clear that the directions received by the captain of a lighter after its arrival at Pier 24 constituted nothing more than a completion of shipping directions, or, at the most, such instructions to the captain of the lighter can be considered only as a change in the contract of shipment or place of delivery, in view of the compensation paid to the Ben Franklin Transportation Company for its entire service and the absence of any separate contract or arrangement for compensation for the lighterage from Pier 24

to the railroad terminal. In this respect the transaction differs from that of the Texarkana case, as one of the facts on which this Court based its decision was the absence of any change in the contract of shipment or place of delivery.

The whole transaction is analogous to the practice on rail lines of billing shipments to a conventional destination at which they are never intended to be delivered, and stopping the same in transit for diversion or reconsignment orders. In such cases it would hardly be questioned that, as a matter of law, the proper rate to apply, assuming the privilege of stoppage for orders to be properly covered by tariff, is the through rate from point of original shipment to destination, with such proper tariff charge as may be made for the stoppage privilege. The Commission has recognized the unity of the transportation transaction in such cases and in other cases of transit privileges by ruling that the rate applicable must be the rate in effect at the time of original shipment.

> "10. (A) * * * Such tariffs must stipulate clearly the extent of such privileges and the charges connected therewith, and shall also state whether or not the rate published by the initial carrier from the point of origin to ultimate destination will apply. If the through rate does apply, it must be as of the date of shipment from point of origin" (Tariff circular 18-A. Rule governing tariffs showing reconsignment privileges).

> "119. *Reshipping of Grain.*—Upon inquiry whether a proposed tariff rule providing that 'the rate to be applied on all outbound transit grain of record shall be the specific rate that is lawfully in effect from Chicago at the time the grain is reshipped, may lawfully be incorporated in a tariff. Held, that the Commission cannot sanction the rule, and that the grain can move only as a through

movement on the through rate in effect at the time it starts, or as a local movement" (Conference Rulings Bulletin No. 5).

In the Texarkana case the Court stated as important factors that the consignee accepted the shipment at Texarkana, the place of delivery, and that the first contract of shipment was thus completed. There is no evidence of such acceptance of shipments by the Federal Sugar Refining Company at Pier 24. The shipments did not leave the custody of the Ben Franklin Transportation Company. There was no receipt given for the property by the Federal Sugar Refining Company on arrival at Pier 24.

The Supreme Court also considered as important in the Texarkana case the fact that the shipment was turned over at Texarkana to another carrier and a new contract for transportation actually made with that carrier. There was no such new contract made between the Ben Franklin Transportation Company and the Federal Sugar Refining Company. The receipt given by the Ben Franklin Transportation Company at Yonkers was the only one shown to have been given, and as stated there was no contract for the separate compensation of the Ben Franklin Transportation Company for the service from Pier 24 to destination, the compensation paid being for transportation from Yonkers to destination.

In the Texarkana case it was also pointed out as an important fact that the shipment remained at Texarkana five days before it was shipped out. In this case the lighter with sugar on board remained at Pier 24 only for such time as was necessary to receive further directions in the form of railroad bills of lading from the office of the Federal Sugar Refining Company, 138 Front Street.

We urge that the facts as above set forth show conclusively as a matter of law that the contract of transportation between the Ben Franklin Transportation Company and the Federal Sugar Refining Company was a contract

for transportation from Yonkers to the terminal of one of these appellees and that, therefore, these shipments are to be regarded as coming from Yonkers, and as a matter of law are not entitled to be treated as shipments originating within lighterage limits on the doctrine of the first decision of the Commission in this case.

The effect of the change in practice was no more than if the Federal Sugar Refining Company had sent its clerk on the lighter of the Ben Franklin Transportation Company to give the lighterman instructions as to the place of delivery after reaching the lighterage limits.

As Commissioner Prouty says in his dissenting opinion (Record, p. 66):

> "The transaction, in fact is precisely the same now that it was formerly, except that the steamer now stops at Pier 24. Great stress is laid in the opinion upon the fact that the *Ben Franklin* is actually made fast to the wharf, but to my own mind it would subserve exactly the same purpose if she were to whistle in midstream when passing that pier. It is impossible for me to understand how any performance of this character can change the actual relation of these parties when the thing accomplished is in both cases identical."

If these shipments of sugar had actually been delivered to the Federal Sugar Refining Company at Pier 24, North River, the 4-cent rate per hundred pounds would have applied and the shipments would then have been entitled to free lighterage from Pier 24 by these appellees under their lighterage regulations to their terminals.

The undisputed facts clearly distinguish the situation here from that presented to the Court in the Texarkana case and the transaction is analogous to that considered in the case of Southern Pacific Terminal Company vs. Interstate Commerce Commission (219 U. S., 498, at pp. 526 and 527). See also Texas & Pacific Ry. Co. vs. Railroad Commission of Louisiana (183 Federal R., 1005).

The question is clearly one of law, under the admitted facts. The similar question involved in the case of Texas & Pacific Ry. Co. vs. Railroad Commission of Louisiana above cited was treated as a question of law. It came to the Circuit Court on exceptions to a Master's conclusions of law. In the case of Gulf, Colorado and Santa Fe Ry. Co. vs. Texas, above cited, this Court stated that it was bound by the findings of the State Court as to the facts, and then proceeded to consider and determine whether, as a matter of law, and on the facts as found by the State Court, the case presented a single continuous shipment or two separate and distinct shipments.

The brief on behalf of the Commission on this appeal clearly shows its misapprehension as to the status of shipments from Pier 24. Attention is called to pages 36 to 39 of the brief. For example, it says on page 36:

> "the Federal Sugar Refining Company furnishes a place within said lighterage limits, namely Pier 24, *where their shipments are handled prior to the time when the transportation of the shipments to the Jersey shore begins* and also furnishes all instrumentalities used in said transportation, free of expense to the carriers, and performs, or causes to be performed, without expense to the carriers, all services connected with *such handling* and transportation. We are therefore unable to see how it can be consistently claimed that the allowances paid on the shipments of Arbuckle Brothers cover *services of a character not performed, or instrumentalities not furnished*, in connection with its shipments, *by the Federal Sugar Refining Company*."

And on page 39:

> "It will thus be seen that the transportation of the shipments which originate at Yonkers and all matters pertaining thereto become a thing of the

past before the transportation from Pier 24 of the shipments which are delivered to the carriers on the Jersey shore begins. At the time the shipments start from Yonkers it is impossible for anyone to know whether they will be forwarded to the Jersey shore or what their final destination will be. At that time the Federal Sugar Refining Company may have decided to forward the shipments over the carrier's lines to western points of destination, but either before or after the shipments reach Pier 24 it may change its mind and either send them to other destinations or sell the sugar included in the shipments for local consumption in New York City."

The shipments of the Federal Sugar Refining Company which are delivered at stations of the railroad companies on the Jersey shore are not handled at Pier 24. They are not taken from the boat which stops there merely for completion of shipping directions. The transportation from Yonkers cannot be separated from the transportation from Pier 24 to the railroad stations across the river. The transportation from Yonkers to the stations on the Jersey shore is clearly an entirety. Possibly the Federal Sugar Refining Company might change its mind and divert shipments starting from Yonkers for delivery at the stations of the railroad on the Jersey shore to local New York consumption or other destinations, but it does not do so. When such shipments start from Yonkers they are clearly destined for delivery to a particular station on the Jersey shore, as shown above. Furthermore it is only when they are so delivered that they have any connection with this case.

The statements in the Commission's brief are clearly erroneous on the basis of the statements in the Commission's Report, quoted in its brief, and which are stated in the brief (p. 39) to be "the same in substance as the allegations contained in the petition of the carriers."

The order of the Commission being based on its con-

clusion in this respect, and such conclusion being erroneous in law, the Commission's order is invalid, irrespective of whether the Commission might or might not lawfully have made the same order on other grounds (Southern Pacific Co. against Interstate Commerce Commission, 219 U. S., 433).

2.

THE ORDER IN EFFECT REQUIRES THESE APPELLEES TO EXTEND THEIR LINES TO YONKERS BY REQUIRING THEM TO PAY MORE THAN THE COST OF BRINGING THE FEDERAL SUGAR REFINING COMPANY'S SHIPMENTS FROM YONKERS.

Upon the first complaint of the Federal Sugar Refining Company, the Commission held that these appellees could not be compelled to lighter the sugar of that company from Yonkers or pay for such lighterage, whether on account of the arrangement with the Jay Street Terminal or otherwise (17 I. C. C., p. 40). This decision was predicated upon the proposition that the extension of these Railroad Companies' lines from the west shore of the Hudson to New York and Brooklyn by means of the lighterage service was a matter of business discretion, concerning which the Federal Government had not assumed to exercise authority, if any exists, and that therefore it could not be a discrimination forbidden by law for the carriers to extend their lines by means of this lighterage service to New York, without extending them still farther, to a distinct municipality like Yonkers.

The correctness of its former decision is recognized by the Commission in its report in this case. Commissioner Harlan, who wrote the opinion of the majority, said:

> "The complainant, the Federal Sugar Refining Company, is also a refiner of sugar and competes with Arbuckle Brothers in supplying that commodity to consumers in the interstate communities

> reached by the defendants and their connections. Its refinery is located at *Yonkers.* Adjacent to and connected with it, the complainant owns a pier or dock. *Yonkers, however, is outside the lighterage limits* established by the defendants in New York Bay and the two rivers, which together form what we have referred to as the harbor of New York; and *the complainant therefore does not enjoy from its dock the benefit of the free lighterage service offered by the defendants, under their tariffs to shippers to and from piers that are within the limits*" (p. 46).

The arrangement for stopping the lighter enroute from Yonkers to Jersey City at Pier 24 and withholding final directions for delivery from the lightermen until said stop was the only new factor before the Commission in the second case, and if the Commission's conclusion that this stoppage enroute effectuated a new shipment from Pier 24, is in error, then the case is absolutely the same as that presented to the Commission on the first complaint of the Federal Sugar Refining Company and should be governed by its decision in 17 I. C. C., 40. Otherwise these appellees will be required to pay even more than the cost of the lighterage from Yonkers to their terminals which means an extension of their lighterage service to the municipality of Yonkers. Such a requirement is beyond the statutory power of the Commission to impose upon these carriers.

The appellees are under no statutory or other legal obligation to extend their lines by rail or water.

It is undisputed that the practical effect of compliance with the Commission's order by payment of an allowance to the Federal Sugar Refining Company would be the extension of lighterage limits to Yonkers, so far as the Federal Sugar Refining Company's shipments are concerned, because it is undisputed that the smaller unit of compensation to the Jay Street Terminal on the tonnage

basis, viz.: 3 cents per cwt., would cover the total charge of the Ben Franklin Transportation Company from Yonkers to Jersey City. It is submitted that the Commission cannot, on the basis of an evident device adopted by the Federal Sugar Refining Company, make an order to accomplish a result which it would clearly be without power to order directly.

Any comparative disadvantage of the Federal Sugar Refining Company arises from the location of its refinery at Yonkers beyond the lighterage limits and off of the lines of these Railroads, and not from the arrangement between the Railroads and the Jay Street Terminal.

As the Commission recognizes (Record, p. 49), the fundamental basis of the Federal Sugar Refining Company's complaint is that it costs it three cents per cwt. to get its sugar from Yonkers to the receiving stations of the railroads on the Jersey Shore, while Arbuckle Brothers' shipments are brought to the Jersey Shore by the Jay Street Terminal for the railroads and at their expense.

This three cents per cwt. cost to the Federal Sugar Refining Company represents the cost to it of getting its sugar down from Yonkers, and the real effort of the Federal Sugar Refining Company is to get its refinery at Yonkers put on the same basis as if it were within lighterage limits by forcing the railroads to assume this cost, the allowance under the Commission's rule being in excess of such cost.

This is clearly shown by the facts as well as by the admission of counsel for the Federal Sugar Refining Company.

"*Counsel for the complainant (Federal Sugar Refining Company), deliberately stated upon the argument that his client would be in no respect benefited if the operation of that terminal (Jay street), were to pass into the hands of a third party or were to be taken over by the defendants themselves*" (Commissioner Prouty, Record, p. 65).

The grievance is therefore not on account of the payments made to the Jay Street Terminal.

It is not on account of any failure or refusal of the railroads to lighter themselves the sugar of the Federal Sugar Refining Company, from any point within lighterage limits, for they are and always have been willing to do that, and offer to do it under their filed and published tariffs, and the Federal Sugar Refining Company has never availed itself of this right. This shows clearly that the Federal Sugar Refining Company can get its sugar from Yonkers to the Jersey Shore terminals as cheaply as it can get it to any point in lighterage limits.

The grievance is solely on account of the refusal of the railroads to extend their lines to Yonkers, by absorbing more than the cost of three cents per cwt. which the Federal Sugar Refining Company is under to get its sugar down from Yonkers.

The erroneous conception of the majority of the Commission as to the cause of the disadvantage under which the Federal Sugar Refining Company rests, appears clearly from the Commission's brief on this appeal. The brief says (p. 30):

> "In consequence of this discrimination the net amount of transportation charges paid by Arbuckle Brothers to the carriers for the transportation of their sugar over the carriers' lines from the Jersey shore to said western points of destination is in each instance less per 100 pounds to the extent of the allowance paid than the net amount of transportation charges paid by the Federal Sugar Refining Company to the carriers for the transportation of its sugar over the same lines of railway in the same direction and between the same points of origin and destination. Also, as a result of said discrimination, the Federal Sugar Refining Company, in competing with Arbuckle Brothers in the sale of sugar at said western points of destination, is, in each instance, handicapped to the full extent of the allowance paid to Arbuckle Brothers as aforesaid."

And on pages 47 and 48:

"The record in this case shows that on an average a large tonnage of sugar is shipped daily to said western points of destination over the lines of the carriers who are appellees herein by Arbuckle and Jamison and also by the Federal Sugar Refining Company, and that both of those shippers deliver their shipments to the carriers for transportation on the Jersey Shore. It also shows that the expense to the Federal Sugar Refining Company of making such delivery is 3 cents per 100 pounds, but that, although Arbuckle and Jamison make delivery of their shipments at their own expense, they are paid therefor by the carriers, according to the destinations of the shipments, either 3 cents or 4 1/5 cents per 100 pounds, while the carriers do not pay like allowances or any allowances at all to the Federal Sugar Refining Company.

This indicates the opinion of the Federal Sugar Refining Company concerning the value of the privilege of making delivery at the Jersey shore, and it also shows the handicap under which that company operates in competing with Arbuckle and Jamison. We have seen that this discrimination results from circumstances and conditions which are wholly artificial and for which the carriers are alone responsible, and we therefore submit that a holding that the discrimination can not be removed because it is authorized by the provision of section 15, above referred to, is a very unreasonable construction of that provision, and that such construction ought therefore to be regarded as unsound."

If Arbuckle Brothers and the Jay Street Terminal be regarded as identical, as the Commission assumes them to be, this disregards the expense of bringing the shipments made by Arbuckle Brothers to the Jersey shore.

But it is quoted here to show how obviously the Com-

mission has overloooked the fact that the 3 cents which the Federal Sugar Refining Company pays, is paid for getting its shipments down from Yonkers and that the handicap under which that Company operates in competing with Arbuckle Brothers is due to the location of the refinery at Yonkers.

To be sure the order permits an alternative, to abandon payments to the Jay Street Terminal on Arbuckle Brothers' shipments, but such payments are lawful, made pursuant to a contract which is greatly in the public interest, and which would be violated by the abandonment of such payments, and it is submitted that the Commission has no power to impose as a condition, upon the exercise of a legal right, that which it could not impose by a direct order. Even if there be unlawful discrimination or preference the Commission has no power to remedy it by an order in the present form.

3.

THE SERVICE PERFORMED BY THE FEDERAL SUGAR REFINING COMPANY THROUGH THE MEDIUM OF THE BEN FRANKLIN TRANSPORTATION COMPANY IS NOT A TRANSPORTATION SERVICE OF THE RAILROAD COMPANIES BUT IS WHOLLY ACCESSORIAL AND CANNOT LAWFULLY BE PAID FOR BY THESE APPELLEES.

The order of the Commission requires these appellees to pay an allowance to the Federal Sugar Refining Company on its sugar brought to their rail terminals on the western shore of the Hudson River by the lighters of the Ben Franklin Transportation Company, providing the payments to the Jay Street Terminal for the service it performs on the sugar of Arbuckle Brothers are continued. The Ben Franklin Transportation Company is an independent boat line and acts as the agent of the Federal Sugar Refining Company in bringing the sugar to the rail ter-

minals of these appellees. The sugar lightered by the Ben Franklin Transportation Company is not delivered to these appellees until it reaches their rail terminals on the western shore of the Hudson. It is at these terminals that the sugar is turned over to these appellees and there the bills of lading are signed by them, evidencing the receipt of the sugar and their contract for its transportation. Under the rulings of the Commission and the decisions of the Federal Courts this service is accessorial and cannot lawfully be paid for by these appellees.

> *In re* Allowances for Transfer of Sugar, 14 I. C. C., 619, 627.
> Wight vs. United States, 167 U. S., 512.
> Chicago & Alton Ry. Co. vs. United States, 156 Fed. Rep., 558.
> General Electric Co. vs. N. Y. C. & H. R.R. R. Co., 14 I. C. C. Rep., 237.
> Solvay Process Co. vs. D., L. & W. R. R. Co., 14 I. C. C. Rep., 246.

In the first cited case the Commission said, on page 627:

> "All the tariffs purport to make the allowance as compensation for transfer. It necessarily follows that if the allowance is to be sustained the transfer of goods to the possession of the carrier must be held to be the carrier's duty for which the shipper making the transfer is entitled to compensation. Such is not the law and the first to resist an attempt to impose such duty upon the carriers would be the carriers themselves. Within the present year this Commission has decided at least two cases in favor of carriers involved in this proceeding and has held that the delivery of goods to a carrier and the receipt of goods from a carrier are duties devolving upon the shipper, for which the carrier cannot be compelled to pay. For carriers to undertake to make to shippers allowances based upon the per-

> formance by the shippers for themselves of services which they are legally bound to do for themselves is for the carriers to violate the act to regulate commerce."

It is true that these appellees hold themselves out as common carriers from all points with the lighterage limits established by them in New York Harbor in accordance with the regulations and rules governing such lighterage service contained in the tariffs on file with the Commission. Under such rules they would take delivery of the sugar of the Federal Sugar Refining Company at Pier 24, North River, the point at which the lighters of the Ben Franklin Transportation Company stop on their way from Yonkers to the terminals of these appellees, and having accepted delivery would perform a transportation service in lightering it from Pier 24, to these terminals. The Federal Sugar Refining Company, however, does not offer its sugar to these appellees at Pier 24, but prefers to offer it to them at their terminals on the western shore of the Hudson River. In other words, the Federal Sugar Refining Company volunteers to perform the lighterage movement itself from Pier 24, to these terminals, instead of requiring these appellees to do it. Is the Federal Sugar Refining Company entitled to payment for this service which it volunteers, and which these appellees would perform, if asked to do so? The Commission has held not in the case of General Electric Company vs. N. Y. C. & H. R. R. R. Co., *supra*, where Commissioner Harlan, writing the opinion, said, on page 244:

> "The complainant is not entitled to compensation as demanded by it in the complaint or on any other ground developed upon the record. It assumed charge of the work of switching cars between its storage tracks and various points within the inclosure of its plant, not because the defendants refused longer to spot cars for it or because they did not give the complainant a reasonably good service

in that respect, but simply because the growth of its business to vast proportions, the multiplication of its buildings, and the extension of its switching arrangements within the inclosure required the complainant to take charge of the interior switching for itself and to exclude the defendants from its plant. And it now demands compensation for doing that which it claims the defendants are under the obligation to do, but which it does not and could not permit them to do. On that ground alone the complaint is without merit. *Relief against a defendant must ordinarily be predicated upon his failure or refusal to do what he is legally bound to do and not upon the fact that the complainant has volunteered to do it for him.*"

Such an allowance to the Federal Sugar Refining Company as provided for by the Commission's order in this case is under the above authorities clearly unlawful under Section 2 and Section 6 of the Act to Regulate Commerce. The Commission has no power to direct such a payment to be made, either as a condition of continuance of payments to the Jay Street Terminal or otherwise.

4.

THE SERVICE PERFORMED FOR THE RAILROAD COMPANIES BY THE JAY STREET TERMINAL IS A TRANSPORTATION SERVICE AS TO SUGAR SHIPPED BY ARBUCKLE BROTHERS AS WELL AS OTHER SHIPMENTS, AND IS NOT AN ACCESSORIAL SERVICE. ARBUCKLE BROTHERS ARE, THEREFORE, SHIPPERS FROM JAY STREET TERMINAL STATION, NEW YORK CITY, AND NOT FROM THE RAILROAD COMPANIES' STATIONS ON THE NEW JERSEY SHORE. THERE CAN BE, THEREFORE, NO VIOLATION OF SECTION 2 OF THE ACT TO REGULATE COMMERCE.

The lighterage or floatage service performed by the Railroad Companies or by the Jay Street Terminal and other terminal companies for them is not accessorial, but a part of the transportation, and the railroads themselves extend to these New York and Brooklyn stations in a legal sense and by statutory definition.

The Law of the State of New Jersey provides as follows:

> "Where the terminus of a railroad company may be on the shore of any river or navigable water of this State, such company may establish and operate ferries for the transportation of persons and property on or across the same, subject to the rates of fare and tolls provided in this act on railroads, and may buy or build vessels and boats and do all things necessary or convenient to carry on such ferry, or may contract with other ferry companies for the transportation of the passengers and freight of such railroad company." Section 19, Chapter 257 of the Laws of New Jersey of 1903. "An Act concerning Railroads (Revision of 1903)"

The Law of the State of New York provides as follows:

> "Any steam railroad corporation, incorporated under the laws of this state, with a terminus in the harbor of New York, may purchase or lease boats propelled by steam or otherwise, and operate the same as a ferry or otherwise, over the waters of the harbor of New York, but this section shall not be construed to affect the rights of the city of New York." Section 84 of Chapter 481 of the Laws of New York of 1910, being Chapter 49 of the Consolidated Laws and known as the Railroad Law.

The Act to Regulate Commerce provides as follows:

> (Section 1.)—"The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also

all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

It is undisputed that Jay Street Terminal is the union freight depot of these appellees used by many important shippers and receivers of freight in the Borough of Brooklyn. It is located at the foot of Bridge Street, Brooklyn, on the East River, having a water frontage of 1,200 feet and a depth of 600 feet. Its equipment consists of a large freight house, two Baldwin locomotives, three tug boats, two steam lighters, ten barges and six car floats. The capacity of the yard is 235 cars. During the first six months of 1907 the bills of lading issued by the Jay Street Terminal for shipments of general merchandise numbered 92,622. There were 765 different consignees and 560 shippers during this same period (Record, pp. 4, 6 and 76, ff.).

The total tonnage handled through the Terminal for the year 1910 was 613,305 tons. The number of shipments made by shippers other than Arbuckle Brothers was 250,480, and the number received by consignees was 40,009, making a total number of shipments handled exclusive of the business of Arbuckle Brothers 290,489 (Record, p. 81).

Jay Street Terminal is owned by a copartnership composed of William A. Jamison and John Arbuckle, the same men who compose the copartnership of Arbuckle Brothers, and although the two copartnerships are, as a matter of law, two distinct and separate entities, the Commission in its opinion ignores this distinction and treats the Jay Street Terminal as the property of Arbuckle Brothers. With this explanation the following excerpts are given from the report of the Commission which clearly indicate that it considered the Jay Street Terminal as the public freight house of these appellees:

> "Under a contract with the defendant carriers Arbuckle Brothers operate the property as a freight station for the defendants. For that use of the dock and for their services in conducting it as a freight station and in floating and lightering shipments between the dock and the regular terminals of the defendants in Jersey City, Arbuckle Brothers receive from the defendants allowances ranging from 3 to 4 1/5 cents per 100 pounds on all merchandise passing through the terminal whether inbound or outbound" (Record, p. 45).
>
> "So far as the general shipping public is concerned, the Arbuckle dock may doubtless now be regarded as a public receiving station of the defendants." * * *
>
> "Arbuckle Brothers not only operate their dock for the defendants as a railway facility, but they also perform the lighterage service between the dock and the regular stations of the defendant on the west shore" (Record, p. 55).

This employment of Jay Street Terminal to act as the public freight station of these appellees in receiving and delivering freight in the Borough of Brooklyn and to perform floatage and lighterage service between Jersey City and Brooklyn was perfectly lawful. It has been held both by the Commission and the Courts that railroads may secure

and maintain freight depots by contract with shippers and that such depots thereby become legally and to all intents and purposes the freight depots of the railroads.

> Central Stock Yards Co. vs. L., & N. Ry. Co., 192 U. S., 568.
> R. R. Com. of Ky. vs. L., & N. Ry. Co., 10 I. C. C. Rep., 173.
> Cattle Raisers Assn. vs. C., B. & Q. R. R. Co., 11 I. C. C. Rep., 277.

The Commission argues, though as stated above it does not formulate a definite conclusion to that effect, that the Jay Street Terminal cannot be a public station of the Railroad Companies, as to shipments made by Arbuckle Brothers, and that the transportation of such shipments up to the station on the New Jersey shore cannot be a transportation service, and must be accessorial. It is "inclined" to this view because, as it states, such shipments belong to Arbuckle Brothers, and incidentally because the Jay Street Terminal could not be expected to be used as a public station by the Federal Sugar Refining Company and because the Jay Street Terminal, which the Commission regards as identical with Arbuckle Brothers, contracts to indemnify the Railroad Companies severally against loss or damage to shipments while in its charge (Record, pp. 53-55).

If this is a conclusion of the Commission it is erroneous in law and the order so far as based upon it, is beyond its power.

It is the same error that the Commission fell into in the elevator allowance cases, covered by this Court's opinion in the so-called Peavey cases (Interstate Commerce Commission vs. Diffenbaugh and other cases, 222 U. S., 42), namely the eroneous theory that a shipper may not lawfully perform a part of the transportation service even for a reasonable compensation, if he derives any incidental advantage. Comparison of the history of the steps by which the Commission finally reached the opinion

that it was unlawful to pay a reasonable amount for the elevation of grain in transit where such grain was treated by its owners in the elevators, with the reasoning employed by the Commission in the two cases of the Federal Sugar Refining Company, shows the same evolution of the final opinion, and the same change of view to which this Court refers in the Peavey decision (222 U. S., 42, at p. 45).

When the Commission first considered the contracts entered into by the Union Pacific Railroad Company with Peavey & Company, under which the latter was employed to elevate grain in transit at 1-1/4 cents per hundred pounds it held that the compensation for the service was not unreasonable, that the service was one which the railroad company could perform itself or could hire others to perform for it, and that no unjust discrimination could be predicated upon the fact that Peavey & Company might obtain incidental advantages in connection with the elevation of the grain (10 I. C. C. 309). This case was decided by the Commission before the amendment to the Act to Regulate Commerce making elevation one of the transportation services to be performed by the carrier and permitting the carrier to employ a shipper to furnish the facilities for the elevation. The Commission at that time expressed its views in regard to arrangements by which a shipper was employed by a carrier to perform a service in connection with his own freight, as follows: "It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded. When anything directly connected with the public service which a carrier is bound or undertakes to perform is farmed out, so to speak, to one of its own shippers, the relation thereby brought about is likely to excite distrust and to be looked upon with suspicion. The provisions of the regulating statute may not be violated, because any resulting discrimination may not be undue, but the situation created cannot be wholly satisfactory."

Upon a rehearing of the case the Commission for the purpose of placing all other shippers of grain on an equality with Peavey & Company ordered the Union Pacific Railroad Company to reduce the payment of 1 1/4 cents per one hundred pounds to three-quarters of a cent per one hundred pounds, which it found to be the cost of the elevation. The Commission again expressed itself as being very much opposed to the employment of a shipper to perform a transportation service although the Act to Regulate Commerce had been amended at the time of this rehearing to expressly permit of such employment and a reasonable payment therefor. Its disapproval was based upon the proposition that the shipper owning the elevator has the opportunity while elevating the grain to at the same time grade, clean and clip it, thus obtaining an advantage over other shippers of grain who are not elevator owners (In the matter of allowances to elevators, 12 I. C. C. Reports, 85).

Upon the second rehearing in this case the Commission took the final step and held that it was unlawful for the Union Pacific Railroad to make an allowance to Peavey & Company upon grain elevated in transit which was mixed, treated, stored, weighed or inspected in the elevator (14 I. C. C., 315). The effect of this last order of the Commission was extended to all allowances paid for the elevation of grain by carriers where such grain was treated during the course of elevation (see Traffic Bureau Merchants Exchange of St. Louis vs. Chicago, B. & Q. R. Co. 14 I. C. C., 317 and 510).

In that case the Commission step by step with the idea of absolutely equalizing the condition of all competing shippers of grain turned absolutely about in its position and finally reversed its first decision, which was the correct one, and by this reversal made a determination that it was absolutely unlawful to pay for services which the Act to Regulate Commerce expressly authorizes the carriers to compensate the shippers for performing (Section 15).

So the Commission has reached the same erroneous position

with respect to the payments made by these appellees to the Jay Street Terminal, for upon the first complaint of the Federal Sugar Refining Company the Commission held the arrangement with the Jay Street Terminal was a lawful one, that the payments made for the services performed by that Terminal were not unreasonable and that, therefore, unjust preference could not arise in favor of Arbuckle Brothers and an unjust disadvantage be imposed upon the Federal Sugar Refining Company as the result of such contract.

Upon the second complaint with absolutely no new factor before the Commission, with the exception of the hollow device of stopping the shipments of the Federal Sugar Refining Company, while in course of lighterage from Yonkers to the terminals of these appellees on the western shore of the Hudson River, at Pier 24, the Commission has condemned the contract with the Jay Street Terminal, as unlawful unless these appellees pay as much to the Federal Sugar Refining Company, for bringing its sugar to their rail terminals, as they pay for all the services performed by the Jay Street Terminal in acting as a public freight station and in lightering all shipments received through that station from Brooklyn to these appellees' railroad terminals, a compensation which if paid to the Federal Sugar Refining Company, will return to it the entire expense which it is put to under its contract with the Ben Franklin Transportation Company of bringing its sugar from Yonkers to these appellees' railroad terminals, and on shipments which are destined to points west of Buffalo and Pittsburg, will give the Federal Sugar Refining Company a profit 1 1/5 cents for the accessorial service which it performs.

The order of the Commission is of course inconsistent in permitting the continuance of what it apparently considers an accessorial allowance to Arbuckle Brothers on condition of payment of another similar illegal allowance to the Federal Sugar Refining Company. On its own argument it should have simply prohibited the so-called

"allowance to Arbuckle Brothers" and had no power to permit it to continue on any such conditions as it has imposed, as shown elsewhere in this brief, but the erroneous theory at the basis of its argument that the Jay Street Terminal service is accessorial as to shipments made by Arbuckle Brothers is none the less apparent.

The Commission's theory also involves errors of law on the incidental points above referred to. The practical objections to the use of the Jay Street Terminal facilities by the Federal Sugar Refining Company are such as must exist to a greater or less degree whenever a shipper performs a transportation service for a carrier on shipments of others who may be his competitors. Such conditions existed undoubtedly in a number of the cases above cited, but they furnished no legal reason why the shipper could not perform a part of the carrier's transportation service as to the shipper's own goods.

In this connection the Commission gives what purports to be a quotation "in substance" of an offer of the Railroad Companies to receive the Federal Sugar Refining Company's shipments at the Jay Street Terminal (Record, p. 54). The use of quotation marks is unfortunate, as the Commission has misconceived the carrier's offer, and the Commission's statement may give the impression that the carrier's offer was limited to, or had some special reference to the Jay Street Terminal, which is not so.

The carrier's offer is, and always has been, to receive shipments of the Federal Sugar Refining Company at any public station in New York City, or at any accessible point within lighterage limits under and in accordance with their tariffs, on file with the Commission (Record, p. 12).

It was never supposed that the Federal Sugar Refining Company would send any sugar to Jay street, Brooklyn, for shipment, no matter who operated the Terminal at that point. The Railroad Companies have numerous public stations in New York as well as on the Jersey shore, which the Federal Sugar Refining Company's sugar would have to pass by to reach Jay Street, and which it

does pass even to reach Pier 24, North River (see map attached to this brief which shows railroad stations, individual and joint, and lighterage limits). The Federal Sugar Refining Company in fact need bring its sugar only so far south as the northern lighterage limits to secure its receipt for shipment by the Railroad Companies.

The assumption of identity of the Jay Street Terminal with Arbuckle Brothers which is also essential to the Commission's theory is likewise erroneous in law. This point will be treated more fully by counsel for the Jay Street Terminal and Arbuckle Brothers.

The Commission's theory is legally erroneous in its assumption that the agreement of Jay Street Terminal to indemnify the Railroad Companies against loss or damage to shipments made by Arbuckle Brothers while in its possession affects the character of the service as a transportation service (Record, p. 55). Such assumption is of course based on the assumed identity of the Jay Street Terminal and Arbuckle Brothers, but apart from that such assumption of liability is material and even an essential element in the transportation service if assumed completely for the time being. It cannot legally affect the character of the service as transportation service, it flows from it.

The Commission also falls into legal error in assuming that all shipments made by Arbuckle Brothers belong to them.

All sugar is sold by Arbuckle Brothers on written orders containing the following phrase: "delivery complete on receipt of goods by carrier" (Record, p. 79). It is understood between the buyers of sugar and Arbuckle Brothers that the title to all sugar sold by Arbuckle Brothers changes to the buyer when the bill of lading is signed at Jay Street Terminal. Eighty-five per cent. of the shipments of sugar made by Arbuckle Brothers are made on so-called "straight" bills of lading showing the name of the purchaser as consignee (Record, p. 80). It is elementary that such a consignment raises a presumption of law to the effect that the title passes to the consignee on deliv-

ery to the carrier. In this case the legal effect of the contract made by Arbuckle Brothers with the purchaser of the sugar, as above stated, is in accordance with the legal presumption.

As to the 15% of shipments covered by bills of lading showing Arbuckle Brothers as consignee, if they are so-called "straight" bills of lading, the presumption that the shipments belong to Arbuckle Brothers after delivery to the Jay Street Terminal is overcome by the facts of the contract as made between Arbuckle Brothers and the purchasers. To the extent that these bills of lading may consign shipments to the order of Arbuckle Brothers, the transmission of the bill of lading to the purchaser, which is done by Arbuckle Brothers the same day and never later than the next day after receipt of the bill of lading from the Jay Street Terminal (Record, p. 80) transfers, as a matter of law, title of the shipment to the holder of the bill of lading.

Arbuckle Brothers being, therefore, as matter of law, shippers over the lines of the Railroad Companies from and through the Jay Street Terminal, they are obviously shippers from a different point and under different circumstances and conditions than the Federal Sugar Refining Company, whose shipments first reach the Railroad Companies in New Jersey. For this reason, if for no other, there can be no violation of Section 2 of the Act to Regulate Commerce in this case.

If, as contendded by appellants, the Arbuckle Brothers shipments were delivered to the Railroad Companies only at their stations on the New Jersey shore, and the railroad transportation began at those points, and the payments made to Arbuckle Brothers were for purely accessorial services and not for transportation services within the meaning of section 15, then such payments would clearly be in violation of sections 2 and 6 of the Interstate Commerce Act and unlawful. In such case the Commission would have no power to make an order permitting the continuance of such violation of the law upon condition

that the Railroad Companies violate it further by making like unlawful payments to one of the other shippers delivering property at such New Jersey stations for transportation. The sole power and the duty of the Commission in such case would be to enforce the provisions of the statute by preventing a continuance of such payments through issuing a "cease and desist" order, or otherwise.

5.

THESE APPELLEES MAY LAWFULLY EMPLOY THE JAY STREET TERMINAL TO FURNISH PUBLIC STATION AND TERMINAL FACILITIES AND SERVICE WITH RESPECT TO SHIPMENTS OF ARBUCKLE BROTHERS WITHOUT BEING COMPELLED TO MAKE PAYMENTS TO THE FEDERAL SUGAR REFINING COMPANY ON ITS SHIPMENTS AT THE SAME RATE PER CWT. AS PAID TO THE JAY STREET TERMINAL.

A.

The fact that the Jay Street Terminal furnishes a public station and terminal service constitutes a difference in circumstances and conditions which the Commission was bound to consider and did not consider.

It is well settled that the entering into a contract with one shipper to furnish station facilities does not result in a violation of the provisions of the Act to Regulate Commerce forbidding undue preferences and advantages, even if similar contracts are not made with all competing shippers in the same locality.

Central Stock Yards Company vs. Louisville & N. Ry. Co., 118 Fed. Rep., 113, at p. 117; aff'd 192 U. S., 568.

Covington Stock Yards Co. vs. Keith, 139 U. S., 128, p. 136.

Butcher's & Drover's Stock Yards Co. vs. Louisville & N. R. Co., 67 Fed. Rep., 35.
United States vs. Delaware, L. & W. R. Co., 40 Fed. Rep., 101.
Consolidating Forwarding Co. vs. Southern P. Co. *et al.*, 9 I. C. C. Rep., 182, p. 206 *e*.
Worcester Excursion Car Co. vs. The Penn. R. Co., 3 I. C. C. Rep., 577, p. 584.
Re Transportation of Fruit, 10 I. C. C. Rep., 360.

An unjust discrimination or an undue preference is not created by the action of a railroad company in employing a shipper to perform a part of the transportation service, when the shipper is paid a compensation that is reasonable for the performance of the service, simply because other shippers who are not in position to perform the same transportation service may be subjected to disadvantages. For example, it is perfectly lawful to pay a shipper for elevating his own grain in transit through his own elevator, even though he may be able to treat his grain during the elevation and thus secure incidental advantages over another competing shipper who does not happen to own an elevator. These incidental advantages accrue because of the fact that one shipper owns the elevator and the other does not. The carrier paying the allowance does not discriminate against the shipper who cannot perform the same transportation service, if the service is offered to all.

F. H. Peavey & Co. vs. Union Pac. R. C., 176 Fed. Rep., 409, aff. 222 U. S., 42.

This is not a case where a payment, offered under published tariffs, for a specified transportation service, is withheld from one shipper who can and does furnish the service, because of an arbitrary rule of the carrier, as in the case of Union Pacific Railway Co. vs. Updike Grain

Co., 222 U. S., . Arbuckle Brothers are not employed to float their sugar from Brooklyn to the rail ends of these appellees on the Jersey Shore. Nor is any compensation offered or paid to that copartnership or any other shipper in the Harbor of New York for the performance of the floatage or lighterage service alone. The Jay Street Terminal is employed as a public freight station of these appellees and as part of its duties floats or lighters all freight shipped through that station to the terminals of these appellees. Even if as a matter of law, undue discrimination and unlawful preference would result from the employment of the Jay Street Terminal as a public freight station, because of the relation of that station to the copartnership of Arbuckle Brothers, unless these appellees made similar contracts of employment with all other competing shipppers of sugar who had the facilities for a public freight station and the equipment to handle the shipments of the public, still the Federal Sugar Refining Company is not subjected to unjust discrimination or undue or unreasonable prejudice or disadvantage until it offers to furnish facilities similar to those owned by the Jay Street Terminal and used by the shipping public at some point within the lighterage limits of New York Harbor.

The fact that the Jay Street Terminal is a public freight station and furnishes public terminal facilities differentiates the situation as a matter of law from the case where an allowance is made to a shipper merely for performing a part of the transportation service on its own goods. The payment to the Jay Street Terminal is made for services more extensive and of a different character.

The aggregate amount paid to the Jay Street Terminal is compensation for the entire service performed by it for the carrier in connection with shipments of the general public as well as shipments made by Arbuckle Brothers. The fact that the compensation is measured by tonnage and that Arbuckle Brothers' shipments are included in such tonnage does not change the situation. The com-

pensation is not 3 or 4 1/5 cents for the service on each cwt. of the Arbuckle Brothers' shipments; the tonnage is a mere measure of the total compensation to be paid for all services, physical, clerical and supervisory, and for the uso of the property engaged in the general public service.

Such circumstances and conditions are circumstances which differentiate, within the meaning of the Interstate Commerce Act as a matter of law, like the existence of controlling competition (T. & P. Ry. vs. I. C. C., 162 U. S., 197). Therefore, there can be, as a matter of law, no undue and unreasonable discrimination or undue preference where such differentiating circumstances exist and where the difference in treatment of the two shippers does not go beyond what is produced by such circumstances.

The Commission is bound to give such differentiating circumstances due weight. It has not done so in this case, partly because it has fallen into the same error as in the cases involving payments for elevation to Peavey & Company and others, and partly because it seeks to avoid the legal effect of the character of the service performed by the Jay Street Terminal on shipments made by Arbuckle Brothers. Both of these points are discussed elsewhere in this brief.

B.

The Circumstances and Conditions with respect to the physical handling by the Railroad Company of shipments made by Arbuckle Brothers and by the Federal Sugar Refining Company are different, and the shipments do not get into "the actual physical possession of the defendants on the Jersey Shore under practically similar conditions," as stated by the Commission (Record, p. 59.)

It will be noted that the Commission does not state that the conditions referred to are the same, but only that "they are *practically* similar."

The shipments made by Arbuckle Brothers are, of course, handled by the Jay Street Terminal for the Railroad Companies before arriving at the stations of the Railroad Companies on the Jersey Shore in the sense that after being loaded into cars by Arbuckle Brothers at Jay Street, the Jay Street Terminal moves the cars to the stations on the Jersey Shore, but as to physical handling of the packages by the Railroad Companies, there is none on carloads, until arrival at destination, if then, or until arrival at a transfer station on less than carload shipments, for the shipments are handled in cars on car floats and delivered to the Railroad Company loaded in cars, so that the Railroad Company has merely to move the car.

On the other hand, shipments of the Federal Sugar Refining Company are brought to the Railroad Companies at their stations on the New Jersey Shore on lighters and not in cars and the sugar has to be taken by the Railroad Company from the stringpiece of the wharf and loaded into cars to go forward to destination or transfer station.

"Floatage" and "Lighterage" are quite distinct and different services from the physical standpoint.

These facts also constitute in law differentiating circumstances and conditions which the Commission was bound to give due weight and did not.

C.

The Railroad Companies are under liability with respect to shipments made by Arbuckle Brothers prior to arrival of same at the New Jersey Shore, which liability does not exist in the case of shipments of the Federal Sugar Refining Company.

Bills of lading of the carrier are issued and outstanding and cover the transportation of sugar shipped by Arbuckle Brothers at the time of its delivery at the Jay Street Terminal, while there is no railroad bill of lading issued and outstanding against the Federal Sugar Refining Company's shipments until they are delivered at Jersey City.

irrespective of any obligation of the Jay Street Terminal to indemnify the Railroad Companies against loss or damage to shipments received at Jay Street Terminal until delivery at Jersey City, the carriers are under obligation, during that period of the transportation, to the consignee or holder of the bill of lading, which does not obtain as to the Federal Sugar Refining Company's shipments until delivery of the shipment at Jersey City. Apart from the possibility of the indemnity of the Jay Street Terminal proving insufficient as to loss or damage which is known to have actually occurred to shipments handled by it before delivery at Jersey City, there may be, of course, cases of loss or damage, the exact time and occasion of which cannot be definitely determined, although in fact, such loss or damage may have occurred while the property was in the possession of the Jay Street Terminal. In such cases the railroad has a responsibility to the consignee or holder of the bill of lading for which it cannot obtain indemnity.

This also constitutes in law a differentiating circumstance and condition.

D.

The amount paid to the Jay Street Terminal per cwt. for its services is an improper and unlawful measure of any payment to be made to the Federal Sugar Refining Company.

The contracts by which the Jay Street Terminal is employed as the public freight station of these appellees provides for compensation for all its services on the basis of 3 cents and 4 1/5 cents per hundred pounds, according as to whether the freight is destined to, or shipped from points east or west of Trunk Line Termini.

These payments are not made as a compensation for the service of floating the sugar shipped by Arbuckle Brothers from Jay Street Terminal to the rail terminals of these appellees. The Jay Street Terminal receives payment for

such service only as an incident to the total payment for its entire service on the sugar shipped by Arbuckle Brothers and all other shipments. It must perform the entire service under the contract to get paid for any part of it.

The undisputed testimony was that the net earnings of the Jay Street Terminal were but 3% on the amount invested with nothing for interest or depreciation (Commission's Report, Record, p. 51) which scarcely shows a profitable transaction, particularly when the large responsibility assumed by the Jay Street Terminal is considered. No contention or suggestion is made that such compensation is too large. Chairman Knapp said in the majority report of the Commission on the first complaint:

> " Indeed, the only inference which can be drawn from the proof submitted is that the Jay Street Terminal does not receive a reasonable return upon the investment" (Record, p. 32).

On the other hand the Federal Sugar Refining Company, under the Commission's order, would receive 4 1/5 cents per cwt. on all the sugar shipped by it over appellees' lines to points west of Trunk Line territory, while the actual cost to it for lighterage would be but 3 cents per cwt. under its contract with the Ben Franklin Transportation Company, thus covering the entire cost of bringing the sugar down from Yonkers, and in addition giving a clear profit of 1 1/5 cents per cwt. without the employment of any capital, or the assumption of any risk or of any obligation to perform any service for others. On shipments to nearby points the Federal Sugar Refining Company would receive only 3 cents per cwt., but that would cover its full cost of lighterage on such shipments and would not affect its profit on the others.

As a matter of fact the transportation of its sugar within lighterage limits costs the Federal Sugar Refining Company nothing, because it has to pay the Ben Franklin Transportation Company as much for bringing its sugar

down from Yonkers to lighterage limits as for the full distance to the Jersey Shore terminals, i. e., 3 cents per cwt.

It is submitted that on these undisputed facts compliance with the Commission's order by payment to the Federal Sugar Refining Company would obviously not prevent discrimination, but cause it, and that the Commission is without power to make the continuance of lawful payments to the Jay Street Terminal conditional upon payments at the same rate per cwt. to the Federal Sugar Refining Company.

II.

The Commerce Court did not err in issuing its order restraining the enforcement of the Commission's order *pendente lite*, because

1. The case presented to the Commerce Court showed the Commission to have made an order based upon errors of law and beyond its power, and was a proper case for the exercise of the power granted to the Court to suspend the enforcement of an order of the Commission *pendente lite*.

2. Irreparable damage would have resulted to these appellees if the order of the Commission had not been enjoined.

3. It was not necessary for the Commerce Court to incorporate in its order a specific finding that irreparable damage would result to these appellees.

I.

The case presented to the Commerce Court showed the Commission to have made an order based upon errors of law and beyond its power and was a proper case for the exercise of the power granted to the Court to suspend the enforcement of an order of the Commission *pendente lite*.

Section 3 of the Commerce Court Act empowers the Court, in its discretion, to restrain or suspend, in whole or in part, the operation of an order of the Commission, pending the final hearing and determination of a suit brought in that Court for the purpose of setting aside, annulling or suspending any order of the Commission. The discretionary power to issue preliminary or interlocutory injunctions specifically granted by this Act to the Commerce Court, is a power which has always existed in Courts of Equity for the purpose of preventing such a change in the conditions and relations of persons and property during the litigation as may result in serious injury to some of the parties before their claims can be investigated and determined. It was not necessary, to justify the issuance of a decree suspending the enforcement of the order of the Commission until a final hearing could be had in the suit brought by these appellees that the Commerce Court should have been satisfied that these appellees would certainly prevail on the final hearing of their suit. If the petition and affidavits presented by these appellees showed to the Commerce Court that they had probable rights which were in danger of being defeated unless the order of the Commission was restrained pending the final hearing, then the legal discretion vested in the Commerce Court was properly exercised.

The facts presented to the Commerce Court upon the hearing for a preliminary injunction clearly indicated that the Commission had, in the issuance of its order, exercised powers not granted to it by Congress and that the

exercise of such powers violated the constitutional rights of these appellees. Upon the facts presented to the Court, it appeared that the Commission in substance had ordered these appellees to pay for the performance of an accessorial service as a condition precedent to the continuance of making payments for the performance of a transportation service, which payments were admitted to be just and reasonable for the services performed. In other words, to support its declared object of placing the Federal Sugar Refining Company on an equal basis with Arbuckle Brothers in shipping sugar over the lines of these appellees and to remove an alleged unlawful advantage and discrimination in favor of Arbuckle Brothers, the Commission has directed that these appellees pay the Federal Sugar Refining Company 3 cents and 4 1/5 cents per one hundred pounds on its sugar, according to the destination thereof, whether east or west of the westerly limits of trunk line territory for the service of bringing this sugar from its refinery at Yonkers to the rail terminals of these appellees on the Jersey Shore and there delivering the sugar to them for transportation, a service which costs the Federal Sugar Refining Company 3 cents per hundred pounds under its contract with the Ben Franklin Transportation Company. Such service precedes the delivery of the sugar to these appellees for transportation and is necessarily accessorial to the transportation service, a service which the shipper is required by law to perform and which railroads cannot compensate the shipper for performing. Unless these appellees violate the law by making such payments for an accessorial service, the Commission's order requires them to discontinue paying the Jay Street Terminal, which is admittedly their public freight station, for receiving and lightering the sugar of Arbuckle Brothers although it is admitted that the sums paid for the performance of this transportation service by the Jay Street Terminal are not in excess of a reasonable and just amount. It necessarily follows upon such a statement of

the real purport of the Commission's order that the Commerce Court must necessarily have found that the Commission had exceeded its statutory powers for certainly Congress has never conferred the power upon the Commission to strike down an admittedly lawful arrangement unless the railroad companies agree to violate the law by entering into an arrangement which is unlawful for the purpose of curing a discrimination.

The undisputed facts presented clearly indicated that in reaching its conclusion the Commission had also fallen into various errors of law, as for example in treating the shipments of the Federal Sugar Refining Company as originating at Pier 24, North River, in failing to give due legal effect to the facts with respect to the relations between these appellees and the Jay Street Terminal, and otherwise as above set forth. The order was thus shown to be beyond the Commission's power because based upon erroneous legal conclusions as well as because the terms of the order itself were such as the Commission could not lawfully impose.

In exercising these unwarranted powers the Commission has violated the constitutional rights of these appellees secured to them by the fifth amendment to the Constitution of the United States by depriving them of the benefits of lawful contracts which they have entered into with the Jay Street Terminal, for certainly it is not due process of law for these carriers to be required to give up the benefits which they now enjoy under their lawfully existing contracts with the Jay Street Terminal unless they enter into an arrangement to pay the Federal Sugar Refining Company for performing an accessorial service.

The power of the Interstate Commerce Commission, which is not subject to review or reversal by the Courts, does not extend to the making of orders which are beyond its power, nor does it extend to the making of orders which are founded on mistakes of law, or which result from failure to give due weight to facts, which as a matter of law, determine the question at issue.

Early in the history of the Interstate Commerce Act, various orders of the Interstate Commerce Commission were set aside under opinions of the Courts, to the effect that the Commission had failed to give due weight to facts constituting dissimilarity of circumstances and conditions within the meaning of the statute. For example, it was held that the fact that a shipment originates in a foreign country constitutes the dissimilarity of circumstances and conditions which justifies the carrier in giving it a lower rate than a shipment originating at the port of entry, where there is competition affecting the foreign shipment and not the domestic shipment ; and it was also held that so-called "Party Rate Tickets" do not make an unjust discrimination when sold at a lower rate per capita than the rate charged a single individual, nor make the rate so charged a single individual unjust or unreasonable within the meaning of the statute (I. C. C. vs. B. & O. R. R. Co., 145 U. S., 263).

The Statute has since been amended so as to enlarge the power of the Commission, but the prohibitions with respect to unjust discrimination remaining unchanged, and orders of the Commission based on the same grounds as those which were then set aside would certainly not now be sustained upon any theory of the conclusive character of the Commission's determinations. In fact, this Court has in very recent cases followed the same principle with respect to the extent to which it will review the Commission's orders. For example, it has looked into the question of whether the testimony showed the existence of a satisfactory through route and reversed the Commission's finding on the point (I. C. C. vs. N. P. Ry. Co., 216 U. S., 538–544), and has also examined the real basis of an order of the Commission and declared the order unlawful and beyond the power of the Commission, on the ground that the basis of the Commission's declaration that the rates were unreasonable were facts which did not in law make the rates unreasonable, although the Commission con-

tended before the Court that its decision was based on other considerations within the scope of its power (So. Pac. Co. vs. I. C. C., 219 U. S., 433).

In the very recent cases of The Interstate Commerce Commission against Diffenbaugh, Same against H. F. Peavey, and Union Pacific Railroad Company against Same, 222 U. S., 42, this Court examined and determined the question of whether contracts made by various railroads for elevation of grain constituted illegal discriminations or rebates and affirmed in its main point the decree of the Circuit Court setting aside the order of the Interstate Commerce Commission.

In the case of the Interstate Commerce Commission against the D., L. & W. R. R. Co., 220 U. S., 235, while the Court held that the determination of the Interstate Commerce Commission that the enforcement of a certain rule by a carrier creates a discrimination, is one of fact, not subject to review by the Courts, it examined into and determined the question of whether the discrimination found to exist by the Interstate Commerce Commission was illegal. It treated the proposition advanced by the carriers that a common carrier may make the ownership of a shipper's goods the criterion by which his charge is to be measured, as a legal proposition, not within the class of conclusions of the Commission which are not susceptible to review by the Courts, and proceeded to pass upon the question (p. 251).

2.

IRREPARABLE DAMAGE WOULD HAVE RESULTED TO THESE APPELLEES IF THE ORDER OF THE COMMISSION HAD NOT BEEN ENJOINED.

It is submitted that the Commerce Court wisely exercised the discretion vested in it as a Court of Equity in enjoining *pendente lite* the order of the Commission. The only person or corporation interested in the enforcement

of the Commission's order is the Federal Sugar Refining Company, and that company can suffer no loss from the suspension of the Commission's order, because should the order be sustained after final hearing on the merits the Commission has power to award reparation to the amount of the allowance on the shipments, covered by its order, which may have moved during the period of suspension.

If the order had not been suspended pending final hearing, these appellees would have been required to commence on June 1, 1911, to make payment of the allowances to the Federal Sugar Refining Company, or else break their contracts with the Jay Street Terminal by refusing to make any payments on account of sugar manufactured and shipped by Arbuckle Brothers. Had these appellees adopted the first method of complying with the order, and the order were finally vacated, it could not recover back the money it had paid to the Federal Sugar Refining Company. Had they adopted the alternative mode of obeying the order, by discontinuing the payments to the Jay Street Terminal on account of the Arbuckle sugar, then they would have been subjected to claims for damages for violation of their contracts with the Jay Street Terminal, the cancellation of said contracts, because of their default in making such payments and the consequent loss of the use of that station and its terminal facilities.

The affidavits of the traffic officers of the appellees and of Mr. Jamison, one of the partners in the Jay Street Terminal, with the exhibits attached to the latter affidavit (Record, pp. 73 to 89), give a clear idea of the importance to the Railroad Companies as well as to the public of the continuance of the Jay Street Terminal as a public station. It appears that, to permit its establishment as such, the City of New York vacated a street on petition of a large number of merchants and manufacturers of Brooklyn, and a list of the substantial commercial receivers and shippers whose freight can be handled to advantage, through Jay Street Terminal, contains over two hundred names (Record, pp. 83–88), while the number of

shippers and receivers other than Arbuckle Brothers who received and delivered freight to and from the Jay Street Terminal was at least five hundred for whom over 290,000 shipments were handled in one year (Record, p. 81). If the shipments made by Arbuckle Brothers are not to be included in computing the compensation of the Jay Street Terminal, it cannot be expected to handle such shipments and its business would be reduced accordingly, and there can at the best be no certainty that the Jay Street Terminal would continue to operate a public station under such conditions. It would be under no legal obligation to do so. There is no other practical means of furnishing the necessary terminal facilities for that section of Brooklyn, as not only dock frontage but upland for the purposes of team track deliveries and stations and warehouses are necessary for such a terminal (Record, pp. 73-74).

3.

It was not necessary for the Commerce Court to incorporate in its order a specific finding that irreparable damage would result to these appellees.

Section 3 of the Commerce Court Act approved June 18, 1910, authorizes the Commerce Court, in the exercise of its discretion, to issue a preliminary injunction or order restraining or suspending the operation of an order of the Commission pending a final hearing and adjudication in a suit brought to set aside, annul or suspend any such order.

Such a preliminary injunction or order cannot issue except upon due notice and a hearing. This section, in addition, empowers the Commerce Court or a Judge thereof to allow a temporary stay or suspension of the operation of an order of the Commission for a period not to exceed sixty days, in cases where irreparable damage would otherwise ensue to the petitioner, upon a short notice of three days to the Interstate Commerce Commission and

the Attorney-General. In case an order is issued granting such a limited temporary stay, it is necessary that the order shall contain a specific finding, based upon evidence submitted to the Judge making the order and identified by reference thereto, that irreprrable damage would result to the petitioner and must specify the nature of the damage.

It is perfectly clear that it is only in case this limited stay of sixty days is granted upon the short notice of three days that a specific statement must be made in the order that irreparable damage will accrue to the applicant for the order. The evident purpose of this provision in Section 3 is to afford a quick remedy, and the limited order is somewhat analogous to a restraining order issued upon an *ex parte* application, the intent being to secure the prompt relief afforded by the *ex parte* restraining order without making it actually available upon an *ex parte* application.

This extraordinary remedy was not resorted to by these appellees. The usual notice was given upon their motion for an injunction restraining the enforcement of the Commission's order *pendente lite*, and consequently the requirement that a specific finding of irreparable damage and a statement of the nature thereof should be incorporated in the order of the Court can have no application.

III.

The decree of the Commerce Court granting an injunction *pendente lite*, restraining the enforcement of the order of the Commission, should be affirmed.

GEO. F. BROWNELL,
H. A. TAYLOR,
Solicitors for Railroad Companies,
Appellees.

18

Supreme Court of the United States,

OCTOBER TERM, 1911.

THE UNITED STATES, the INTERSTATE COMMERCE COMMISSION and the FEDERAL SUGAR REFINING COMPANY,

Appellants.

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *et al.*,

Appellees.

In Equity,
No. 722.

STATEMENT, BRIEF AND ARGUMENT ON BEHALF OF THE FEDERAL SUGAR REFINING COMPANY.

ERNEST A. BIGELOW,
Solicitor for Federal Sugar Refining Company.

New York, December 27th, 1911.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1911.

THE UNITED STATES, the Interstate Commerce Commission and the Federal Sugar Refining Company, Appellants, vs. THE BALTIMORE & OHIO RAILROAD COMPANY, The Central Railroad Company of New Jersey, *et al.*, Appellees.	In Equity, No. 722.

STATEMENT, BRIEF AND ARGUMENT ON BEHALF OF THE FEDERAL SUGAR REFINING COMPANY.

This is an appeal from the United States Commerce Court in a suit instituted to enjoin the enforcement of an order of the Interstate Commerce Commission.

The complainants in the bill are

(1) The Baltimore & Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, New York, Ontario & Western Railway Company, and The

Pennsylvania Railroad Company, trunk-lines having their rail terminals on the west shore of New York harbor;

(2) John Arbuckle and William A. Jamison, co-partners, operating a sugar refinery under the firm name of Arbuckle Brothers and a dock and lighterage business under the firm name of Jay Street Terminal, adjacent concerns located in Brooklyn, intervenors; and

(3) The Brooklyn Eastern District Terminal, a corporation operating a dock and lighterage business adjacent to the Havemeyers & Elder refinery now owned by the American Sugar Refining Company, and located in the Williamsburg district of New York City, intervenor. The aforesaid parties are interested to defeat the order of the Commission.

The defendant named in the bill is the United States; the Interstate Commerce Commission appeared by its Solicitor; and the Federal Sugar Refining Company, a New York corporation, having its main offices in the Borough of Manhattan, New York City, and operating a sugar refinery at Yonkers, N. Y. intervened and was made a party defendant.

The order of the Interstate Commerce Commission was made on December 5, 1910, in a proceeding wherein the Federal Sugar Refining Company was complainant and the rail terminals above named were defendants, and is to be found at pages 67 and 68 of the Record as follows:

> "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof, and having found that the allowances paid by the above named defendants to Arbuckle Brothers on their sugar

brought by them on floats from (and) lighters to the regular terminals of defendants on the Jersey shore in the State of New Jersey, while at the same time paying no such allowances to complainant on its sugar brought by it on lighters to the defendants' said regular terminals on the Jersey shore, unduly discriminate against said complainants and unduly prefer said Arbuckle Brothers in violation of the act to regulate commerce:

It is ordered, that the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain, from paying such allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowances to said complainant on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce."

A copy of the report and order of the Commission is hereto annexed as Appendix A, but the facts found by the Commission and their conclusions of law may be summarized as follows: The appellee carriers offer free lighterage to and from their rail terminals on the New Jersey shore to all shippers located within certain arbitrary limits established by the carriers, the lighterage cost being absorbed in the New York rate, which is the same as the rate from the rail terminals; but the exclusive privilege is granted to shippers John Arbuckle and William A. Jamison, above named, to lighter their own sugar in their own equipment, and deliver it to the carriers at their rail terminals aforesaid, for which service the carriers pay to the said shippers Arbuckle and Jamison an allowance of 3 or 4 1/5 cents per cwt. according to whether the sugar is consigned

to points east of Buffalo and Pittsburgh, or to points beyond. No such allowance, nor any allowance, is made to the Federal Sugar Refining Company although this company also lighters its sugar in its own equipment and delivers it to the carriers at their said rail terminals on the New Jersey shore for transportation under circumstances and conditions precisely similar to those attending the transportation of the sugar of its competitors, Arbuckle and Jamison.

The carriers seek to justify this discrimination on the ground that the private dock of Arbuckle and Jamison has been adopted by the carriers as their receiving station; but the Interstate Commerce Commission holds that no such artifice can conceal the true nature of the transaction and has ordered the carriers to stop paying the allowance to Arbuckle and Jamison unless they shall also pay it to the Federal Sugar Refining Company. This is the order complained of in the bill herein.

In further justification of their conduct, the carriers set up that the refinery of the Federal Sugar Refining Company is located outside the free lighterage limits. The lighterage distance from the Federal refinery to the various rail terminals of the appellee carriers is less, in some instances, than the lighterage distance from the extreme points within the lighterage limits to the said rail terminals, but the carriers refuse to rearrange the limits so as to include Yonkers, thereby compelling the Federal to lighter at its own expense the very considerable proportion of its shipments which the exigencies of the situation, including the inadequate service provided by the New York Central & H. R. R. Co., force it to ship over the lines of the appellee carriers.

Under these circumstances, in May, 1907, the Federal Sugar Refining Company of Yonkers, predecessor of the Federal Sugar Refining Company, appellant herein, filed a complaint with the Interstate Commerce Commission

alleging unjust discrimination and undue preference, and praying that the appellee carriers be compelled either to provide free lighterage for its shipments from Yonkers or to pay to the Federal Company, on its shipments delivered to the carriers at their rail terminals, the same allowances paid to Arbuckle and Jamison on their sugar similarly delivered (I. C. C., Docket No. 1082). The case was submitted in June, 1908, and on June 24th, 1909, the complaint was dismissed without prejudice by the Commission, divided four to three. The majority, Chairman Knapp writing the opinion, held that the carriers were under no obligation to extend their lighterage limits to Yonkers. The dissenting Commissioners held that the transportation service rendered by the carriers begins at their rail terminals on the New Jersey shore and that it is unlawful for the carriers to pay to Arbuckle and Jamison and to refuse to pay to the Federal Company the allowances for their precisely similar services in bringing their shipments to the rail terminals. One member of the majority agreed with the principle expounded by the dissenting Commissioners but cast the deciding vote against the Federal Company on the ground that its refinery was not located within the lighterage limits.

Thereupon, the Federal Company altered its method and began shipping its sugar from Yonkers to Pier 24, a point within the lighterage limits, consigned to itself at its head office, located as aforesaid in New York City, and, upon arrival of the shipments, initiating from that point the interstate transportation of its sugar over the lines of the appellee carriers. Forthwith, in October, 1909, it filed a new complaint with the Commission (I. C. C. Docket No. 2888), which is the proceeding now before this Court. In the meantime, the Commission had granted a rehearing in the previous case (Docket No. 1082) and the two cases were heard together.

The contention of the Federal Company is that now, as formerly though under a different guise, Arbuckle and Jamison are performing accessorial services prior to the beginning of the transportation by the carriers, and that it is unlawful for the carriers to pay them an allowance therefor unless the same allowance is paid to the Federal Company and to all shippers tendering sugar in similar fashion at the rail terminals; and further, that if the lighterage from the Arbuckle dock be considered as a part of the transportation, as the term is used in Section 15 of the act to regulate commerce, then it is unjust discrimination for the carriers to grant to one shipper and to refuse to others, the privilege of performing that portion of the transportation, and the allowance therefor. The contention of the appellees is that transportation does not begin at their rail terminals but that the carriers have extended their lines to the Arbuckle dock by adopting and duly publishing this private dock as their terminal; that, having the right to establish a dock terminal and conduct lighterage transportation therefrom, they have the right, under Section 15, to pay a shipper a reasonable charge and allowance for performing this service in their behalf; and that, as the carriers cannot be compelled to "extend their lines" to any other private dock, no illegality can be predicated from their refusal.

After due hearing and investigation, these cases were submitted on April 13, 1910, and in March 1911 the Interstate Commerce Commission promulgated its report and order therein, dated the 5th day of December 1910, whereby the then defendants, the appellee carriers herein, were ordered to cease and desist from paying allowances to Arbuckle Brothers on their sugar while at the same time paying no such allowances to the Federal Sugar Refining Company on its sugar, the payment of said allowances to Arbuckle Brothers being found to be discriminatory and in violation of the act to regulate commerce. The report

and order of the Commission sustained the contentions of the then complainant as above outlined. Two members of the Commission, the then Chairman Knapp and Commissioner Prouty, dissented.

Just prior to the effective date of the order, the then defendant carriers petitioned the United States Commerce Court for a decree enjoining the enforcement of the order; thereafter all the petitioners moved for a temporary stay pending final determination, and the respondents moved to dismiss the bill for want of equity and because the Commission's order was an adjudication of matters of fact and conclusive, the Court hearing both motions together and giving precedence to the motion for a temporary stay. A few days later, orders were entered denying the motion to dismiss and granting the motion for a preliminary stay, no opinion being delivered by the Commerce Court, and the respondents took their appeal to this court. The errors assigned by the Commission and the Federal Sugar Refining Company will be found at pages 128-130 of the Record.

CALENDAR.

No. 1082, before the Interstate Commerce Commission,		submitted	June 23, 1908.
		decided	" 24, 1909.
No. 2888,	ditto	submitted	April 13, 1910.
		decided	Dec. 5, 1910.
		promulgated	March 6, 1911.

No. 38, before the U. S. Commerce Court,	
Motions for injunction and to dismiss submitted	May 17, 1911.
Time to file brief for United States expired Saturday	" 20, 1911.
Injunction granted	" 22, 1911.
Time to file brief for Erie R. R. expired	" 25, 1911.

FIRST POINT.

The present arrangement between the carriers and Arbuckle and Jamison is a gross fraud upon the spirit, and the intent, and the letter of the acts to regulate commerce. The arrangement had its origin in a flagrantly unlawful preference of these great shippers and was devised to perpetuate such preference.

According to Blackstone, courts of equity were established "to detect latent frauds and concealments." Here is such a one. Scarcely latent, scarcely concealed, except in so far as there has been a grudging and contemptuous adoption of the disguise suggested as a sop to the law. The form is the form of an innocent contract between a carrier and a dock and lighterage concern; the substance is that of an unlawful and grossly unjust preference of one group of shippers as against their competitor.

The Commission made very definite findings of fact in this connection. It says:

> "In the past, as we know from various investigations and from an examination of old tariffs, Havemeyer & Elder, the predecessors of the American Sugar Refining Company the dock of which is also involved in this proceeding, for many years enjoyed illegal preferences at the hands of the carriers. It is also our understanding that when Arbuckle Brothers began to compete with the Havemeyer refineries, these allowances were extended to them, apparently under some sort of verbal arrangement. It was not until after the enactment of the socalled Elkins law that the lighterage allowances on sugar from the Arbuckle piers seem to have been published. They were then limited to sugar and coffee, being the commodities in which Arbuckle

Brothers were interested; and they were paid, as the tariff states, 'on account of the peculiar physical situation at the water front adjacent to the Arbuckle refinery,' a statement that has not been satisfactorily explained to the Commission although commented upon at the hearing. The allowances at both piers seem therefore to have had their origin in an unlawful preference of these great shippers. Apparently it was not until some years afterwards that the two piers were made public receiving stations of the defendant carriers. And it is sought to justify the allowances now paid to Arbuckle Brothers and the withholding of similar allowances to the complainant, on the ground that a substantial use is now made of the Arbuckle dock as a public terminal for handling the traffic of other shippers. It is contended that the allowances are unobjectionable at this time, either upon moral or legal grounds, because Arbuckle Brothers, as agents of the defendants, are now handling the merchandise of other shippers through their dock, and therefore may lawfully receive allowances on their own shipments as well as upon the shipments of others. It is our observation that such arrangements are rarely entered into with small shippers, but usually only with shippers that are financially strong and control a large traffic." (R., 49-50.)

After citing an instance of the sale of tonnage by the Havemeyers to one of these appellee carriers, the report proceeds:

"This matter, as well as the fact that the original allowances given to the Arbuckle Brothers were limited to sugar and coffee, the commodities in which they deal, are here recalled for the purpose of emphasizing what seems to be clearly established by the records of the Commission, namely, that the allowances

were originally extended to these shippers in order to put them on a preferred basis. It was not until after the regulating body had been strengthened by additional legislation that the two docks seem to have been designated, in the published tariffs of the defendants, as railway terminals and were thus made to subserve the convenience of such of the general shipping public in Brooklyn as might be able to use them." (R., 50.)

"The peculiar, physical situation at the waterfront adjacent to the Arbuckle refinery" forsooth! The physical situation was peculiar only in this, that there was sugar tonnage at that point, that is to say, at the Arbuckle private dock, and that that sugar tonnage could be had by these carriers only on condition that they allowed Arbuckle to share with the Havemeyers the plunder reserved for favored shippers. (R. 51.) Long before this provision was inserted in the tariffs, these allowances were being paid to Arbuckle; (R. 49) but Federal grand juries were getting active (United States vs. D. L. & W. R. R., 152 F., 269) and something had to be done to keep out of jail, and so this extraordinary discrimination, and its equally extraordinary justification, were brazenly proclaimed to the public.

Then came the adoption of the Arbuckle docks as the "terminals" of the railroads. Just how far this device was forced on the carriers by fear of the Interstate Commerce Commission and just how far by the controlling greed of Arbuckle and Jamison does not appear in the record; in any event, the device was seized upon by all these carriers and they proceeded to parcel out the Brooklyn shipping district between Arbuckle and Jamison and the Brooklyn Eastern District Terminal, giving exclusive rights to each in its own territory, the railroads agreeing not to establish any other freight stations within the allotted territory *"unless legally compelled to do so"!* (R. 19.)

A terminal monopoly having been thus granted, it is not surprising that it thrived. According to Jamison's affidavit in support of the motion for preliminary injunction, (R. 81) Arbuckle sugar in 1910 constituted only 44% of the total tonnage east *and* west bound. How much more illuminating would have been the figures for west bound tonnage only, in view of the fact that Arbuckle sugar does not move east. This information, however, is omitted and we can only surmise that, if east and west bound tonnage is about evenly divided, then 88% of west bound tonnage is Arbuckle sugar,—not a bad proportion considering the 200 "shippers of importance" whose names and addresses are annexed to the affidavit as using the Arbuckle dock.

To bolster up the claim that here is a legitimate farming out of a portion of the transportation under Section 15 of the act to regulate commerce, the appellees have the amazing effrontery to declare that "the profits in the operation of the Jay Street terminal on all shipments during the same period amounted to less than 3% on the investment, without making any allowances for depreciation or interest." (R. 6). No wonder the Commission remarked that "net earnings, as every one knows, vary with the character and extent of the items embraced on the expense side of the account." (R. 51). No allowance for the depreciation of bulkheads, docks, machinery, tugs and lighters! No allowance for interest on an investment of $1,200,000, (R. 51) whereof the land and buildings are assessed for taxation at $1,757,300! (R. 77). This, then, is a philanthropic enterprise conducted by John Arbuckle and William A. Jamison, a charity which according to the figures must cost them, allowing 5% for interest and 10% for depreciation, a total of at least $180,000 annually. And such is their conviction that it is more blessed to give than to receive that they have sent their lawyers to urge this Court not to allow their competitor, the Federal Company, to share with them this beatitude; they want, all to

themselves, this privilege of serving the "large and important shipping interests of this section" (R. 6) at an annual cost of approximately $200,000!

Not so, however, the Brooklyn Eastern District Terminal. Altruism plays but a small part in the Havemeyer system. Accordingly, we find this company petitioning the Commerce Court to allow it to intervene in opposition to the order of the Commission because, if the Federal is successful, the American Sugar Refining Company will demand and must be accorded the right to perform its own lighterage and the allowance therefor, and thus the Brooklyn Eastern District Terminal *will lose its best customer!* (R. 95-96.) If it be asked why the American should demand a privilege which is costing Arbuckle and Jamison a vast sum annually, the answer will also be found in the petition where it is innocently admitted that the cost of the service, even in hired lighters, will amount to no more than 3 cents per cwt., thus enabling "all of the said refineries, as well as the said Federal Sugar Refining Company, though maintaining no terminal stations, to earn the same profit *and receive the same rebate* on such sugar of 1 1/5 cents per hundred pounds, and to make the freight rate payable upon such sugar less than the published rate by that amount." (R. 95.) The pointed use of the word "rebate" as applied to an allowance for lightering one's own sugar and the lamentable conflict as to the financial results, indicate that there is a certain ataxia afflicting the ranks of those opposed to the Commission's order herein.

But perhaps the best indication of the absurdity of the claim that Arbuckle and Jamison are conducting an eleemosynary enterprise is to be found in the contract between these gentlemen and the carriers, the 15th paragraph whereof provides (R. 19) that for a breach of the covenant assuring to Arbuckle and Jamison the exclusive right to perform all lighterage within their allotted territory, they shall be paid by the carriers "damages at the rate of

three dollars for each and every carload, averaged at 20000 pounds, received or delivered or transported contrary to this provision." One and one half cents per hundredweight. For loss of their profits on the lighterage which may escape them they are to receive damages liquidated at 1½ cents per cwt. Bearing in mind the theory on which liquidated damages, as distinguished from a penalty, may be sustained, it is not difficult to arrive at the conclusion that the profits on lighterage approximate 1½ cents per hundredweight. Evidently their distrust of each other outweighed their fear of the law; otherwise such a devastating admission would not have been allowed to find its way into the written contract.

These facts and inferences are brought here to the attention of the Court not at all with the idea of showing that the allowance made to Arbuckle and Jamison is unreasonable within Section 15; counsel has consistently refused to develop that side of the evidence, resting his case on the contention that, as transportation by the carriers begins at the rail terminals on the New Jersey shore, *any* allowance to Arbuckle, whether more or less than their lighterage cost, is a rebate and a discrimination against the Federal Company. The facts are alluded to here simply to show the inherent vice, the devious thought-processes involved, in the contention of the appellees and the alleged facts on which it is rested.

And underlying it all is the fundamental purpose to handicap the independent company, the outsider, the Federal Sugar Refining Company, and prevent it from entering the markets on equal terms with Arbuckle and Jamison; in other words, to defeat the intention of Congress, as manifested in the act to regulate commerce. The lighterage limits could be expanded at will, in all directions, north, east and south, but never to Yonkers for there was located the Federal's refinery. The docks of favored shippers could be adopted as "terminals" of the carriers,

but never those of the Federal Company. The head offices of the Federal were situated not three blocks away from those of Arbuckle Brothers but the Federal was of that class of shippers for whom the lighterage limits were expressly established,—to keep them out, as this case shows. Nearly one-third of the west bound tonnage originating in New York City is sugar (R., 52); controlling such a substantial proportion of the total tonnage, the Havemeyers and Arbuckle Brothers issued their orders to the railroads, and those orders were submissively obeyed. (R. 51.) It remains to be seen whether the evil has been so obscured that it cannot be reached under existing law.

Taking advantage of a subordinate section of the act to regulate commerce, the appellees propose to defeat the fundamental purpose of the Act. Their method is simple: to declare the favored shipper's private dock to be a railroad terminal, grant him exclusive territory and trust to the necessities of the general public to force the growth of the terminal and conceal the underlying purpose. In final analysis the theory of the carriers is that they have the right "to extend their lines" to the private dock of any shipper merely by publishing his dock as a terminal and engaging him to conduct the lighterage; in other words, that their lines may be extended by fiat, duly published. If the scheme is permitted to succeed, a new and dangerous method of unjust discrimination will have been devised, compared to which the former methods were mere adolescents.

SECOND POINT.

The Commission's findings of fact, supported as they are by the evidence, will not be reviewed by this Court, and its conclusions of law were correctly drawn.

The order of the Commission is based on two propositions:

1. The transportation of Arbuckle and Federal sugar, *by the carriers,* begins at the rail terminals on the New Jersey shore, and the lighterage service is a purely accessorial service, rendered prior to the beginning of such transportation; wherefore it is unjust discrimination for the carriers to pay to Arbuckle and Jamison, and refuse to the Federal Company, an allowance on sugar thus delivered to the carriers and by them transported under substantially similar circumstances and conditions.

2. If, however, the transportation of Arbuckle sugar by the carriers begins at Jay St. Terminal and the lighterage be a "service connected with such transportation" for which the carriers may, under Section 15 of the Act, pay a reasonable allowance, then it is equally true that the Federal Company furnishes precisely the same facilities, at Pier 24, and performs the same service in the transportation of its sugar; wherefore, it is unjust discrimination and undue preference to pay an allowance to one and not to the other; or, stated in another way, to grant to Arbuckle and Jamison the privilege of, and allowance for, conducting a portion of the transportation of their sugar and at the same time to refuse a similar privilege and allowance to the Federal Company.

I.

As to the first proposition, the findings and conclusions of the Commission may be briefly summarized thus: Ar-

buckle and Jamison lighter their own sugar, from their own docks, in their own equipment, *and at their own expense and risk,* and deliver it to the carriers at their rail terminals on the New Jersey shore; on sugar so delivered the carriers pay to Arbuckle and Jamison an allowance of 3 or 4 1/5 cents per hundredweight, according to ultimate destination. (R. 45-46, 53.) The process is the same now as it was in the early days when it plainly constituted an unlawful rebating, except that the parties have entered into an agreement whereby the Arbuckle dock is made the receiving station of the carriers and it is so published in the tariffs. To the claim that Arbuckle and Jamison have thus been constituted the agents of the carriers, the Commission answers that, while it is true that bills of lading are issued in the names of the carriers by Arbuckle and Jamison as carriers' agents to Arbuckle and Jamison as shippers, nevertheless this is an empty form inasmuch as the contracts between the parties expressly provide that these shippers shall assume the entire responsibility for the merchandise received at their docks for shipment until the lighters carrying the same have been made fast to the float-bridges of the carriers on the New Jersey shore (R. 53); wherefore it results that if Arbuckle sugar is lost in the harbor, Arbuckle and Jamison as shippers will receive from the carriers a sum in damages which Arbuckle and Jamison as agents must forthwith repay to the carriers under the indemnity clause of the contracts. There being nothing, then, to distinguish the shipments of Arbuckle and Jamison from those of the Federal Sugar Refining Company, which likewise lighters its sugar from its own docks, at its own expense and risk, and delivers it to the carriers at their said rail terminals (R., 53-54), the Commission concludes that it is unjust discrimination for the carriers to pay an allowance to Arbuckle and Jamison and refuse it to the Federal Company, the transporta-

tion service rendered by the carriers being like and contemporaneous, of a like kind of traffic and under substantially similar circumstances and conditions (R. 51, 59).

So far as the above conclusions embody findings of fact they appear not to be reviewable by the Courts; and it is to be noted that the finding that there is unjust discrimination is a conclusion of fact.

> Interstate Com. Com'n vs. D. L. & W. R. R. Co., 220 U. S., 235.

So far as these conclusions involve matters of law they appear to rest on but a single legal proposition, to wit: that, inasmuch as the receipt of goods by the carrier, *eo instanti* with the assumption of responsibility therefor, marks the beginning of "transportation," as the term is used in Section 2 of the act, the contractual relation of carrier and shipper being non-existent up to that moment of time, therefore the transportation of Arbuckle sugar by these carriers does not begin until the lighters are made fast to their float-bridges on the New Jersey shore, that being the point of time at which the carriers accept the goods and assume responsibility therefor.

This proposition would seem to be elemental.

> Coe vs. Erroll, 116 U. S., 517, 528.
>
> L. & L. F. Ins. Co. vs. R. W. & O. R. R., 144 N. Y., 200.
>
> Penn. Ry. vs. Int. Coal Mining Co., 173 F. 1.

If the Commission was right in thus concluding that the "transportation" of Arbuckle and Federal sugar begins at the rail terminals on the New Jersey shore, it is immaterial whether the shipments originated at Brooklyn or Yonkers or Pier 24, inasmuch as Section 2 of the act to regulate commerce does not allow the carriers to make a difference in rates because of differences in circumstances arising before the service of the carrier begins. For this

reason, the fact that Federal sugar is reshipped at Pier 24 is not discussed here but will be taken up later as a factor bearing on the second proposition involved in the Commission's order.

On the first proposition, therefore, it is submitted that, as the Commission has correctly disposed of the question of law, its finding that the arrangement between Arbuckle and Jamison and the carriers creates an unlawful discrimination, being a finding of fact which is supported by the evidence and as such not reviewable by the courts, should be accepted by this tribunal.

II.

As to the second proposition, the basic findings and conclusions of the Commission may best be stated verbatim, except for the appropriate changes in appellation:

> "The sugar of the two competing shippers gets into the actual physical possession of the (appellee carriers) on the Jersey shore under practically similar conditions, and if, as the (appellee carriers) contend, the Arbuckle sugar commences to move at the Arbuckle dock, it must be remembered that the (appellee carriers) also contend that their transportation for the general public also extends to and commences at every other pier and dock within the lighterage limits that they have established. If then, the (appellee carriers) permit Arbuckle Brothers to furnish the lighterage facilities for their own sugar and perform the lighterage service across the river, and if this is to be regarded as a part of the transportation offered by the (appellee carriers) under their tariffs, it is difficult to see upon what theory the (appellee carriers) may defend their refusal to recognize the lighters hired by the (Federal Sugar Refining Co.) as its

facilities in performing for the (appellee carriers) a similar part of the transportation service. It seems to us very clear that the payment of allowances to one of these competing shippers, for a service of transportation alleged to be performed by them for the (appellee carriers) with their own facilities, creates a present actual and substantial inequality that is unlawful under the act, when similar allowances are refused to the other and competing shipper for an exactly similar service. * * * The Arbuckle sugar moves either from the Jersey side or the New York side of the river. If its transportation commences at the New York side, as the (appellee carriers) contend, then it appears that Arbuckle Brothers, besides being paid for using their own dock as a receiving station for their own sugar, are also accorded the privilege of providing the lighters and performing a part of the transportation service on the sugar, namely, from the dock to the regular receiving stations of the (appellee carriers) west of the river; it also appears that they are well and amply paid for this service and the use of their facilities. The Federal Sugar Refining Co., on the other hand, does precisely the same thing from another dock within the lighterage limits and is refused any compensation at all. That is the actual situation before us as revealed upon the record." (R. 59-60.)

"This particular sugar happens to have been refined at Yonkers. But wherever it may have been made, the relevant fact from a transportation point of view is that at a given moment a quantity of sugar is at Pier 24 ready for shipment to interstate destinations on the lines of these (appellee carriers). It matters not how it got there, whether by lighter or by cart or by wheelbarrow; it is ready for shipment at that point. At the same time a like quantity of sugar is

ready at the Arbuckle dock for shipment over the same lines and to compete in the same markets. Under every principle of equality embodied in this legislation the (appellee carriers) must deal with the two shippers on exactly equal terms. They must themselves lighter the sugar to their regular freight stations across the river with their own equipment, or must accord to each shipper the privilege of doing the lightering in his own way; and if under section 15, or under any other provision of the act, they pay an allowance to one of the two shippers, on the theory that he has furnished a facility and performed a part of the transportation service for the (appellee carriers), they must make a like allowance to the other shipper who has done precisely the same thing." (R. 58-59.)

"We had not regarded section 15 of the act as a warrant to a carrier for making an allowance to one shipper providing a facility and performing a service in the transportation of his own property, while refusing a similar allowance to another shipper providing a similar facility and performing the same service in the transportation of his property. Nor had we understood that a carrier, while giving to one shipper the privilege of providing a facility and performing a service in the transportation of his property, could refuse the same privilege to another shipper, and compensate the former while refusing any allowance to the latter. Nor is that the law. Certainly it can not be the law when the two shippers are competitors in the same line of business and in the same markets. If the (appellee carriers) accord Arbuckle Brothers the privilege of lightering their sugar from their dock and make them an allowance therefor, we regard it as axiomatic, under the principles of this legislation, that they must accord a like privilege and make a like allowance to the (Federal Sugar Refining Co.) from

Pier 24, the (Federal Co.) being a competitor in the same line of business and reaching the same markets of consumption. Indeed, we see little ground, upon the facts now before us, for denying the privilege and the allowances to the (Federal Co.) from the point where its sugar crosses the lighterage limits established by the defendants. That, however, is a question that need not be discussed, for we have found that the (Federal Co.) now lighters its sugar from Pier 24 which is within the lighterage limits." (R. 56.)

Briefly stated, then, the Commission finds that both shippers perform precisely the same service in lightering their respective shipments from points within the lighterage limits and delivering them to the appellee carriers at their rail terminals, and that, if the service performed by Arbuckle and Jamison be a part of the transportation, within the scope of Section 15, so also must be the service performed by the Federal Company On this finding, which is of fact, the Commission bases the further finding of fact, that to pay to Arbuckle and Jamison an allowance for their services and to refuse to pay the Federal Company for its precisely similar services is to discriminate unlawfully. In the latter finding is involved the conclusion of law that Section 15 affords no warrant to the carrier to create a discrimination prohibited by other sections of the act to regulate commerce and this conclusion will now be considered.

The relevant portion of Section 15 of the act to regulate commerce is as follows:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a com-

plaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Possibly, under this section the carriers have the right to grant to Arbuckle and Jamison the privilege of acting as their own receiving station and performing therefrom a portion of the transportation, and to pay them therefor; but the carriers go further and argue that, as the section is permissive merely, they have the right to refuse the same privilege and compensation to the Federal Company. This proposition, however, overlooks the fact that the right to confer the privilege under Section 15, and the duty not to exercise that right in such fashion as to create the undue preference prohibited by Section 3, are two quite different things. *In the case at bar the question is not as to the power, under Section 15, to grant the privilege to Arbuckle and Jamison; the question here is as to the right, under Section 3, to refuse a similar privilege to the Federal Company, and thereby, as was found by the Commission, give rise to preferences and engender discriminations prohibited by the act to regulate commerce.*

The act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference, and it would be absurd to allow the incidental and wholly subordinate provisions of Section 15 to frustrate the fundamental purpose of the act. As was said by this Court in Interstate Com. Comm. vs. Ill. Cent. Ry. (215 U. S., at 477), in discussing another paragraph of this same section, to adopt the contention of the carriers would be to hold "that Congress, in enlarging the power of the Commission over rates,

had so drafted the amendment as to cripple and paralyze its power in correcting abuses as to preferences and discriminations which, as this Court has hitherto pointed out, it was the great and fundamental purpose of Congress to further."

Looking at the question from another point of view, Section 6 of the act requires that the schedules published by the carriers shall "state separately * * * all privileges or facilities granted or allowed." The tariffs of these carriers duly publish the fact that free lighterage will be accorded to and from any dock, public or private, within the lighterage limits, and the appellees allege that they will send lighters to Pier 24 and transport therefrom the sugar of the Federal Company, the lighterage cost to be absorbed in the rate. But this is not the point. It is not denied that no unjust discrimination can be predicated from an offer made to all, although some accept and others reject its advantages. The carriers go further, however, and grant to Arbuckle and Jamison and refuse to the Federal Company the privilege of conducting the lighterage themselves and receiving an allowance therefor. Here is a privilege which is neither published in the tariffs nor granted to all shippers and it is this, as appellants contend, which constitutes the undue preference and discrimination, and it is this which the Commission, a "tribunal appointed by law and informed by experience" has found as a fact to give rise to preferences and engender discriminations prohibited by the act to regulate commerce.

In the Grain Elevator cases recently before this Court (Interstate Com. Com'n vs. Diffenbaugh, 222 U. S. 42) "the "same services in elevation were offered to all shippers, "and the same allowance was made to all operators of "elevators, whether they were or were not the owners of the "grain transported." (See opinion of Circuit Court, 176 F. at page 411.) Would this court have approved of the allowances had it appeared that, although free elevation

was granted to all shippers, the right to perform this service and receive a cash allowance therefor was exclusively granted to but one shipper?

The answer is to be found in the recent decision of this Court in Union Pac. Ry. vs. Updike Grain Co., (222 U. S. ——), wherein was examined the practice of the carrier in offering to pay all shippers for elevator services and then by special rules so restricting the offer that only the Peavey Company could avail of it. Declaring that the power to make such a discrimination would prevent the enforcement of any regulation frequently having such operation, this Court laid down the broad rule that "the carrier cannot pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service." This appears to dispose of the contention of the appellees that they may pay Arbuckle and Jamison for lighterage service performed as part of the transportation under Section 15, and refuse payment to the Federal Company for its services, precisely similar, as the Commission has found.

One other conclusion of law is embodied in the Commission's second proposition, viz.: that the Federal Company initiates the interstate transportation of its sugar, *so far as these carriers are concerned*, at Pier 24, a point within the lighterage limits. This proposition depends upon whether the intention of the Federal Company as to the ultimate destination of its sugar has any bearing on its two separate contracts with the Ben Franklin Company, one to transport the sugar to Pier 24 and notify the consignee; the other to transport from Pier 24 to the rail terminals.

It would seem that merely to state the proposition is to answer it, within the authority of

Gulf C. & S. F. Ry. vs. Texas, 204 U. S., 403.

The Commission found as facts that Federal shipments from Yonkers are consigned to the head office in New York

City and that the local transportation is complete when the lighters are made fast at Pier 24 and notice is given to the consignee; that "the lighterman has no authority to go further or any instructions for a further movement and must wait there for authority and instructions"; and that the second movement is not initiated until, upon notice of arrival, the Federal Company issues instructions to the lighterman either to discharge at the dock or to proceed to the receiving stations of various carriers, rail or water, and among others the appellee carriers, bills of lading being then handed to the lighterman for execution by the receiving carriers. (R., 47-49.)

Here, then, are two independent shipments, one local, the other the beginning of an interstate movement, and it is the latter which alone concerns the appellee carriers. The fact that the shipper may have intended a further movement when the sugar was loaded at Yonkers is utterly immaterial so far as its contract for local transportation is concerned and it was so held in the case cited, where the court said:

> "Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn, was a matter immaterial so far as the completed transportation was concerned,"

instancing as analogous the case of a passenger who buys a ticket for one place intending all the while to proceed therefrom to a further destination.

On the second proposition, therefore, it appears that the Commission has found that the Federal Company lighters its sugar to the appellee carriers from Pier 24 (R. 56), basing this conclusion on a sound principle of law, and that this company and Arbuckle and Jamison perform "an exactly similar service" so far as the carriers and Section 15 are concerned. (R. 59.) It further appears that the Commission reached a sound conclusion of law in ruling

that the power conferred on the carriers by Section 15 carries no warrant to use that power in such fashion as to discriminate between shippers, in violation of other sections of the Act. (R. 56, 58-59.) Wherefore, it is submitted that the finding of the Commission (R. 67-68) that to grant to Arbuckle Brothers and refuse to the Federal Company the privilege of conducting a portion of the transportation, and the allowance therefor, is to unjustly discriminate against the Federal Company and to unduly prefer Arbuckle and Jamison, should, as a finding of fact, be accepted by this Court.

THIRD POINT.

The so-called admission by counsel for the Federal Sugar Refining Company did not admit, at least in the sense ascribed to it by the dissenting Commissioners; and, in any event, is quite immaterial.

In his dissenting opinion, Presiding Judge Knapp of the Commerce Court, the then Chairman of the Commission, says: "Indeed, in one aspect the facts now presented seem to me less favorable to complainant, since it appears in this proceeding, by the explicit avowal of its counsel during the oral argument, that the transfer of the Jay Street terminal to the defendant carriers and its operation by them would result in no benefit to complainant. This being so, as must be assumed from the admission made, I do not see how the ownership and operation of that terminal by Arbuckle Brothers constitutes undue preference to them or undue prejudice to complainant." (Rec. 61).

Commissioner Prouty, also dissenting, says: "Counsel for the complainant deliberately stated upon the argument that his client would be in no respect benefited if the oper-

ation of that terminal were to pass into the hands of a third party or were to be taken over by the defendants themselves. If, then, the complainant is not damaged by the arrangement as it exists, why should we interfere with that arrangement which appears to be for the common benefit of the public and of the railways?" (Rec. 65).

With the utmost deference to these learned Commissioners it is submitted that their proposition amounts simply to this: If the accessorial allowance on shipments received by the carriers at their rail terminals be discontinued and, in stead thereof, the rails of the carriers (figuratively speaking) be extended to Jay Street thereby making that dock a veritable terminal of the railroads; in other words, if the carriers cure the discriminatory accessorial allowance by extending their lines to the point at which the accessorial service begins, the Federal Company will not be benefited; wherefore it cannot be damaged by the arrangement as it exists.

It seems that here is a *non sequitur*. As well might it be said that there was no discrimination in the Wight case (167 U. S., 512) because the complaining shipper would not have been benefited if the railroad had extended its rails to the warehouse of the favored shipper. In both cases there was discrimination and the way to cure it *to the benefit of the complaining shipper* was to stop it, not to perpetuate it in another form, however nearly that form might assume a semblance of legality.

Such was the scope of the so-called admission, but, even if made with the full force and effect attributed to it by the dissenting Commissioners, it is quite immaterial, this Court having ruled that the Commission has the power in the public interests to consider the whole subject, disembarrassed by any supposed admissions, even if contained in the statement of complaint.

C. H. & D. Ry. vs. Interstate Com. Com'n, 206 U. S., 142, 149.

FOURTH POINT.

The Federal Sugar Refining Company has no apologies to offer for adopting the expedient of re-shipping at Pier 24, an expedient which has received the sanction of this Court.

The plan was adopted in order to meet the views of the Commissioner who had cast the deciding vote against the company in the case as first submitted. (I. C. C. No. 1082). This Commissioner agreed with the minority that the transportation of Arbuckle sugar by the carriers began at the rail terminals on the Jersey shore and that unjust discrimination would necessarily exist if the carriers permitted one sugar shipper within the lighterage limits to lighter his sugar and receive pay for that service and refused the same privilege and compensation to another sugar shipper also located within the lighterage limits; but he concurred with the majority on the sole ground that the Federal refinery was not located within the lighterage limits. (R. 33.) At that time the fact had not been brought clearly to the attention of the Commission that the head and only general offices of the Federal Sugar Refining Company were located within the lighterage limits (R. 47). Having in mind the rule applied in the case of Gulf, C. & S. F. vs. Texas (204 U. S., 403) counsel advised the Federal Company to have the shipments from the Yonkers refinery consigned to itself at its head offices and then, and not till then, to initiate the interstate transportation in which alone these carriers are interested. This course was adopted, with the result that Commissioners Clark and Cockrell concurred in the majority report issued in the second case presented to the Commission (I. C. C. No. 2888) and now before this Court.

As to the propriety of its motives, the Federal Company conceives that it is entitled to accommodate its conduct to

settled principles of law, even though it be impelled thereto by an enlightened self-interest.

It appears that, in the case cited, the shippers *"kept themselves informed* of interstate commission freight rates and of the State commission rates, *and the reason why* they contracted for the corn to be delivered to them at Texarkana was because they could fill their contract with Saylor & Burnett at Goldthwaite at about 1½ cents per bushel cheaper than they could if they had bought the corn for delivery to them at Kansas City and had it shipped from Kansas City to Goldthwaite." (204 U. S. at 406.) Nevertheless this Court did not feel called upon to moralize on the pernicious ingenuity of these shippers nor did it stigmatize their traffic economies as artifices and shams. The officers of the Federal Sugar Refining Company likewise "kept themselves informed" as to traffic conditions, and their purpose in adopting the new method of shipment was precisely the same as that animating the Texan shippers, viz.: to obtain the benefit of favorable rates imposed on the carriers by a duly constituted authority.

The appellees find solace in characterizing the method as a "subterfuge" and the Federal Company makes no objection to the appellation, provided the word be given its primary meaning, viz: "that to which a person resorts for escape." Here, truly, is "that to which a person resorts for escape," for escape, that is to say, from an unjust discrimination practiced by the carriers in favor of the Federal's competitors, Arbuckle and Jamison, at first in open defiance of, and now in disingenuous submission to, the act to regulate commerce.

FIFTH POINT.

On this appeal the Court may properly consider and decide the whole cause on the merits.

The bill presents only questions of law and is based substantially on the points relied on by the dissenting members of the Interstate Commerce Commission. There is no material conflict between the Commission's findings of fact and the facts alleged in the bill; nor would it avail the complainants in this Court if there were such conflict. The transcript before this Court, therefore, plainly exhibits the whole case made or which can be made by the complainants, and the Court is able, without injustice, to finally determine the entire merits of the cause.

It is submitted, under these circumstances, that this Court may properly, if so minded, remand the case with directions to dismiss the bill, thereby saving to both sides the delay and expense of further and useless litigation.

> Smith vs. Vulcan Iron Works, 165 U. S., 518.
> Mast, Foos & Co. vs. Stover Mfg. Co., 177 U. S., 485.

in which case the Court cited with approval

> Knoxville vs. Africa, 77 F., 501.
> Green vs. Mills, 69 F., 852.

FINAL POINT.

Until the act to regulate commerce was strengthened, the Federal Sugar Refining Company endured without effective protest a vicious discrimination perpetrated by these railroads on behalf, if not at the instance, of the Federal's competitors. Since May, 1907, the company has struggled to convince the Interstate Commerce Commission that,

having the will, the Commissioners had also the power under the law, to redress the grievance. The equities are with the Federal Company and the case presents certain aspects which should peculiarly appeal to this tribunal.

Wherefore, it is respectfully submitted that the case should be considered on its merits, that the order of the Commission should be allowed to stand, and that the decree of the Commerce Court should be reversed and the case remanded with directions to dismiss the bill.

Ernest A. Bigelow,
Solicitor for Federal Sugar Refining Company.

Dated New York, December 27, 1911.

APPENDIX A.

REPORT AND ORDER OF THE

INTERSTATE COMMERCE COMMISSION.

No. 2888.

FEDERAL SUGAR REFINING COMPANY

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Submitted April 13, 1910. Decided December 5, 1910.

1. A carrier is not warranted under section 15 of the act in making an allowance to one shipper who provides a facility and performs a service in the transportation of its own property, while refusing a similar allowance to another shipper, competing in the same markets and in the same line of business, who provides a similar facility and performs the same service in the transportation of his property.

2. The allowances paid by the defendants on the sugar brought by Arbuckle Brothers on floats and lighters to their regular freight stations on the Jersey shore, no allowances being paid to complainant on sugar brought by it on lighters to the same stations, result in inequalities, preferences, and discriminations and are unduly prejudicial to the complainant as a

shipper over the defendants' lines in competition with Arbuckle Brothers in the same markets.

3. The fact that Arbuckle Brothers operate their dock in Brooklyn as a terminal for the defendants does not justify an allowance to them for lightering their sugar to the regular stations of the defendants on the Jersey shore so long as an allowance to the complainant for lightering its sugar to the same stations from Pier 24 is refused.

4. A receiving station operated for carriers by a competitor in the same line of business is not a reasonable facility of transportation to offer a shipper.

REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

The general facts involved in this controversy were first brought to our attention in a proceeding under the same title reported in 17 I. C. C. Rep., at p. 40, where the Commission was divided, one member supporting the order then entered on the special grounds explained in his concurring opinion, while three members joined in a dissenting opinion. This complaint, presented not as a supplemental petition in the first proceeding, but as an original complaint, comes before us on an additional record and upon a new state of facts. We are also asked in this connection to consider a petition for a rehearing of the former complaint.

A careful examination of the report of the majority in the original case and of the concurring and dissenting opinions will conduce to a more accurate understanding of the case as well as the grounds on which were based the divergent views entertained in the Commission upon the facts then before us. In disposing, however, of this new

complaint it is our purpose to state the facts as they now appear and to consider the case *de novo* and upon the record as it now stands.

Among the several corporations and copartnerships engaged in the refining of sugar in and about the harbor of New York City the only ones that we are concerned with at this time are the complainant and a copartnership widely known as Arbuckle Brothers, which owns an extensive property at the foot of Bridge street in the city of Brooklyn having a frontage of 1,200 feet on East River and locally known among the shippers that use it as the Jay Street terminal of the defendants. Under a contract with the defendant carriers Arbuckle Brothers operate the property as a freight station for the defendants. For that use of the dock, and for their services in conducting it as a freight station and in floating and lightering shipments between the dock and the regular terminals of the defendants in Jersey City, Arbuckle Brothers receive from the defendants allowances ranging from 3 to 4 1-5 cents per 100 pounds on all merchandise passing through the terminal, whether inbound or outbound. The floats and barges used in this service are owned by Arbuckle Brothers and all persons employed in the handling of the freight, on the water as well as on the dock, are on the pay rolls of that firm.

The property immediately adjoining the dock property is also owned by Arbuckle Brothers, and on it they have erected a large sugar-refining plant. No less than one-third of all the merchandise handled through the dock by Arbuckle Brothers in their capacity, as is here contended, as agents of the defendants, is sugar manufactured and owned by Arbuckle Brothers in their capacity as refiners and shippers of sugar. As shippers Arbuckle Brothers daily deliver at the Jay Street terminal a large tonnage of refined sugar for carriage to various interstate points of consumption. It is contended here that they receive their

own sugar on their own dock as agents of the defendant carriers. In lighters, or on floats, owned by them but which, it is claimed, they operate as agents of the defendants, they carry their own sugar thence to the regular freight-receiving stations at the rail ends of the defendants on the Jersey shore. On every 100 pounds of sugar thus delivered at the Jay Street terminal by Arbuckle Brothers, as shippers, to Arbuckle Brothers, as agents of the defendant carriers, and lightered by them in the latter capacity, as is contended, across the river to the defendants' depots, Arbuckle Brothers receive, as heretofore stated, an allowance of from 3 to 4 1-5 cents. They receive similar allowances on the merchandise of other shippers handled through the Jay Street terminal in the same manner. It may be well here to add that the defendants assert that the Jay Street dock was made a railroad terminal in order to provide a freight station for the shipments of manufacturers and merchants in Brooklyn who have no dock of their own. And it is true that a substantial tonnage, said to be about two-thirds of the total tonnage now passing through the terminal, is of that character.

The complainant, the Federal Sugar Refining Company, is also a refiner of sugar and competes with Arbuckle Brothers in supplying that commodity to consumers in the interstate communities reached by the defendants and their connections. Its refinery is located at Yonkers. Adjacent to and connected with it the complainant owns a pier or dock. Yonkers, however, is outside the lighterage limits established by the defendants in New York Bay and the two rivers, which together form what we have referred to as the harbor of New York; and the complainant therefore does not enjoy from its dock the benefit of the free-lighterage service offered by the defendants, under their tariffs, to shippers to and from piers that are within the limits. It is said that the complainant may reach the destinations in question, and in most instances at the same

rate, by diverting its sugar to the New York Central at Yonkers, whence it can be carried to Sixtieth street and floated across the harbor to the receiving stations of the defendants on the west side of North River. It is asserted, however, and this we take to be established of record, that, for various reasons and because of delays in the handling of shipments, the complainant has found by actual experience that it can not successfully meet the requirements of its patrons by using that route. And it has been compelled to find other means for delivering its refined sugar to the defendants at Jersey City. It has therefore entered into an arrangement with the Ben Franklin Transportation Company for lightering its sugar to the same freight depots of the defendants west of the river to which Arbuckle Brothers lighter their sugar.

Under the arrangement in effect at the time its first petition was before us, the sugar was lightered by the Ben Franklin Transportation Company directly from the complainant's dock at Yonkers to the defendants' freight depots on the Jersey shore. But since our report in that proceeding was announced the method of handling the traffic has been changed, and the arrangement upon which this complaint is based was agreed upon and carried into effect by the two companies It becomes necessary, therefore, at this point to explain the conditions under which the complainant's sugar now reaches the defendants at their receiving stations west of the river.

Since its incorporation in 1907 the complainant has maintained its general offices at 138 Front Street, in the City of New York, where all its accounts and records are kept, except such as pertain to the actual operation of the refinery at Yonkers. Here its president and other executive officers and their subordinates are located and the actual business of the company is conducted. The only employees at the refinery are those engaged in the operation of the plant, including the superintendent, the checkers, weighers,

samplers, shipping clerks, etc. The books kept at the refinery are tally books, weighers' books, samplers' books, records of meltings, and similar documents and papers that pertain to the actual conduct of the refinery. The records of the financial operations of the company, the sales of its products, and all its general correspondence are kept at the general offices.

For fifteen years the Ben Franklin Transportation Company has been a lessee of a portion of Pier 24, in North River, at the foot of Franklin street, the other portions of the pier being rented to other water lines It is an independent company engaged in a general lighterage and towing business on the Hudson River. It seems not to be affiliated, either in fact or in origin, with the complainant and to have no intercorporate relations with it. One of its officers is said to own 10 shares of the common stock and 170 shares of the preferred stock of the complainant company. With that exception, which may be disregarded as having no significance, the only relation between the two enterprises rests on the contract between them under which the transportation company undertakes to lighter the sugar of the complainant, first to Pier 24 and thence, as it may be directed, to the Jersey City terminals of the defendants and to receiving stations of other water and rail lines. This work is carried on by it substantially as follows:

A lighter reports every morning at the dock of the complainant at Yonkers and receives such sugar in barrels, boxes, or other packages as may be ready for shipment. The superintendent of the refinery, having been previously advised from the company's general offices in New York City of the quantity of sugar required in order to fill accepted contracts, has the sugar ready at the stringpiece and it is loaded into the lighter by employees of the transportation company. The officer in charge of the lighter gives a receipt for the shipment and in return is handed a document showing the complainant as the consignor at

Yonkers and the consignee at 138 Front street. It also gives the contract numbers, together with the weight and description of the packages. The lighter then proceeds with its load to Pier 24, which, as heretofore stated, is within the lighterage limits. It is there made fast to the dock and notice of its arrival is given at the general offices of the complainant. Thereupon the complainant issues shipping instructions to the transportation company and hands to its representative a bill or bills of lading for execution by the defendant carriers upon the delivery of the sugar on the Jersey shore. Upon receiving these instructions and the bills of lading the lighter proceeds to the freight depots on the Jersey side and there makes delivery of its cargo, by unloading the sugar upon the car platforms of the carrier or carriers named in the lading papers. The bills of lading are executed by the carriers and returned to the lighterman.

For its services in taking the sugar first to Pier 24 and then, after receiving instructions and the bills of lading, in carrying it across the river and making delivery at the rail ends of the defendant carriers, the Ben Franklin Transportation Company, under its contract with the complainant, demands and receives 3 cents per 100 pounds. As Arbuckle Brothers receive from the defendant carriers an allowance of from 3 to 4 1/5 cents per 100 pounds upon delivering their sugar across the river at the same freight depots, the complainant contends that the defendant carriers subject it to an unlawful discrimination when they decline to make it similar allowances for delivering its sugar to the defendants at the same place and in the same manner. That is the point of controversy to which our attention has been directed in both these proceedings. On the record in the former proceeding, as heretofore explained, it appeared that the lighterage movement commenced at Yonkers, which is outside the lighterage limits. On the record now before us the complainant contends that the lighterage movement to the receiving stations west of

the river commences at Pier 24, where the complainant gives its shipping instructions to the lighterage company. Without entering here upon any discussion of the importance of the fact in the disposition of this proceeding, it will suffice to say that we accept the complainant's contention that the sugar is now being lightered to the defendants at Jersey City from Pier 24, which is inside the lighterage limits. The lighter is actually made fast to that pier when it arrives from Yonkers; sometimes a portion of its cargo is discharged there and held in storage, presumably for local use; the lighterman has no authority to go further or any instructions for a further movement, and must wait there for authority and instructions; upon receiving orders he lighters the cargo as directed, sometimes to one station and sometimes to another, the cargo not infrequently being divided among the several receiving stations across the river, or being delivered to water lines or railroads other than the defendants, all in accordance with the instructions received at Pier 24.

The one fact that stands out prominently upon this statement of the case is that it costs the complainant 3 cents per 100 pounds to tender its sugar to the defendants at their regular receiving stations on the Jersey shore, being the points where the actual rail transportation begins, while the defendants relieve Arbuckle Brothers of any such expense by paying them the ample allowances heretofore mentiond. Around this fact the whole controversy turns. As manufacturers and shippers of sugar, the complainant and Arbuckle Brothers are competitors in the markets reached by the defendants. Under the arrangement heretofore described the defendants return to Arbuckle Brothers the full cost, and apparently something more than the cost, of lightering their sugar across the river. They refuse to bear this burden for the complainant. And the question is whether this condition of affairs, as between the two competing shippers, results in an undue and unjust

prejudice and disadvantage to the complainant. In its actual financial and commercial results there can be no doubt that the complainant is at a disadvantage in competition with Arbuckle Brothers with an adverse margin against it of from 3 to 4 1/5 cents per 100 pounds. But is it as a matter of law such an undue and unjust prejudice and discrimination as is condemned and made unlawful by the act?

In support of the agreement between the defendants and Arbuckle Brothers it is urged that the defendants require a freight station on the Brooklyn shore, and that the dock belonging to Arbuckle Brothers is well situated for the purpose, and is, and has been, and in the future will continue to be, a convenience to shippers. This may be conceded without being conclusive either as to the legality or the good faith of the relations at present subsisting between the defendants as carriers and Arbuckle Brothers as shippers. In the past, as we know from various investigations and from an examination of old tariffs, Havemeyer & Elder, the predecessors of the American Sugar Refining Company the dock of which is also involved in this proceeding, for many years enjoyed illegal preferences at the hands of the carriers. It is also our understanding that when Arbuckle Brothers began to compete with the Havemeyer refineries, these allowances were extended to them, apparently under some sort of verbal arrangement. It was not until after the enactment of the so-called Elkins law that the lighterage allowances on sugar from the Arbuckle piers seem to have been published. They were then limited to sugar and coffee, being the commodities in which Arbuckle Brothers were interested; and they were paid, as the tariff states, "on account of the peculiar physical situation at the water front adjacent to the Arbuckle refinery," a statement that has not been satisfactorily explained to the Commission although commented upon at the hearing. The allowances at both piers seem therefore to have had their

origin in an unlawful preference of these great shippers. Apparently it was not until some years afterwards that the two piers were made public receiving stations of the defendant carriers. And it is sought to justify the allowances now paid to Arbuckle Brothers and the withholding of similar allowances to the complainant, on the ground that a substantial use is now made of the Arbuckle dock as a public terminal for handling the traffic of other shippers. It is contended that the allowances are unobjectionable at this time, either upon moral or legal grounds, because Arbuckle Brothers, as agents of the defendants, are now handling the merchandise of other shippers through their dock, and therefore may lawfully receive allowances on their own shipments as well as upon the shipments of others.

It is our observation that such arrangements are rarely entered into with small shippers, but usually only with shippers that are financially strong and control a large traffic. As is pointed out in the dissenting opinion in the first of these proceedings (17 I. C. C. Rep., at p. 51), an instance of this nature was developed in the investigation entitled "*In the Matter of Allowances for Transfer of Sugar*," 14 I. C. C. Rep., 619. It appeared in the course of that inquiry that the Pennsylvania Railroad Company has a wharf in Brooklyn immediately adjoining the Brooklyn Eastern District terminal, a property of the Havemeyers, who were said to be closely affiliated with the American Sugar Refining Company. This dock will be considered later in this report. It will suffice at this point to say that, in the investigation referred to, the freight-traffic manager of the Pennsylvania Railroad Company frankly admitted that his company, notwithstanding the proximity of its own dock, had made the Brooklyn Eastern District terminal its terminal also and, in order to get a share of the sugar tonnage of the Havemeyer refinery, had agreed to pay lighterage allowances on sugar shipped from that dock.

Defining the transaction in the plainest terms the Pennsylvania Railroad Company simply purchased its part of the traffic of that very extensive shipper; and, in view of the allowances then being made by other carriers, it could get a portion of the tonnage in no other way. This matter, as well as the fact that the original allowances given to the Arbuckle Brothers were limited to sugar and coffee, the commodities in which they deal, are here recalled for the purpose of emphasizing what seems to be clearly established by the records of the Commission, namely, that the allowances were originally extended to these large shippers in order to put them on a preferred basis. It was not until after the regulating body had been strengthened by additional legislation that the two docks seem to have been designated, in the published tariffs of the defendants, as railway terminals and were thus made to subserve the convenience of such of the general shipping public in Brooklyn as might be able to use them.

These dock properties may make convenient terminals for a substantial amount of general traffic, but it is somewhat singular that with the entire Brooklyn river front available, and much of it equally convenient, the two docks, one directly owned by Arbuckle Brothers and the other by persons having supposedly very close relations with the American Sugar Refining Company, apparently the only sugar refineries now in operation in Brooklyn, should have been selected for railroad terminals. The explanation lies undoubtedly in the fact that sugar moves westbound from New York City in larger volume probably than any other commodity; indeed, we were recently advised in another connection by the well-informed general counsel of one of these defendants that sugar constitutes almost one-third of all the traffic moving westward from that point of origin. If this estimate is even approximately accurate, it was a traffic that skillful shippers could readily turn to their advantage under the demoralized conditions pre-

vailing when these allowances were first paid. Under the better conditions now generally prevailing it is a traffic that the defendants ought to be prepared to receive and handle with their own facilities. Bu, instead of acquiring or renting these or similar dock properties and operating them as terminals with their own employees, they have contracted for their operation by these great shippers and interests that are closely allied with great shippers. And, notwithstanding the very extensive fleet of tugboats and barges owned and used by the defendants in the harbor of New York, contracts have also been made with the private interests that own the two docks to do the lightering. It is impossible to conclude on all the information before us that these continued relations between the defendant carriers and great shippers and interests closely allied and largely identified with great shippers, are wholly disinterested, however much of a convenience the docks may now be to some of the general shipping public.

It is also urged that the investment of Arbuckle Brothers in their dock property approximate $1,200,000, and that the net earnings from its operation in 1907 as a terminal for the defendants amounted to but $35,566.84, this being only slightly in excess of 3 per cent on the investment, nothing being allowed for interest and depreciation. Net earnings, as everyone knows, vary with the character and extent of the items embraced on the expense side of the account. But the accuracy of these figures may be admitted without bringing us any nearer to a solution of the problem presented to us by the complainant. The fact will still remain that Arbuckle Brothers, as shippers of sugar over the lines of the defendants, enjoy a substantial advantage over its competitor, a shipper of sugar over the same lines to the same destinations. As owners of a dock property that is doubtless growing rapidly in value, their arrangement with the defendants enables them to hold and carry it at a substantial net profit and at the same

time reimburses them for the cost of delivering their sugar to the defendants on the west shore of the river for carriage to interstate destinations. The defendants decline to reimburse the complainant for the cost of delivering its sugar at the same receiving stations under substantially similar conditions.

But we are told that if the defendants should now purchase the Arbuckle dock and operate it as a freight station with their own agents and employees, and do the floating and lightering across the river with their own equipment, the Arbuckle refinery would still have the advantage of its proximity to the dock, and Arbuckle Brothers would still have their lighterage done free of charge, as would all other shippers to and from that terminal; while the complainant would continue under the disadvantage of having to lighter its sugar from Yonkers either to the regular receiving stations of the defendants west of the river or to the Jay Street terminal, or to some other point within the lighterage limits where the sugar would be accessible to the free-lighterage service now performed in New York Harbor by the defendants. And this is regarded as a conclusive demonstration that the discrimination alleged by the complainant can not be undue, as this phrase is used in the act. The discrimination, it is said, can not be undue or unjust under the act when by a mere change in the title of the dock property, from the alleged preferred shipper to the carriers, the discrimination would be eliminated while the complaining shipper would be left in precisely the position in which it now is. There is only an apparent force, however, in that point of view. As well might it be said that the payment to a shipper of an unlawful rebate is not an undue preference because, if stopped, the competitor will still be under the obligation of paying the lawful rate. Moreover, the tendency of the suggestion is to favor such relations between carriers and particular large shippers, when in the general interest

such relations ought to be discouraged. Under that view a carrier desiring the traffic of a large shipper may relieve him of his expense for teaming by making his warehouse a terminal depot and himself an agent for teaming his own shipments to its regular station, as well as the shipments of others that find it convenient to use the new depot. And, as we are told, it would suffice to say of such a condition of affairs that it could be no undue discrimination against the competitors of the favored shipper, because, if the ownership of the warehouse should pass from the favored shipper to the carrier, his competitors would still require teams for delivering their shipments either at that depot or at the carrier's regular receiving station.

We can not accept that as a controlling view of such a state of facts as is here shown to exist. A carrier may doubtless wrongfully give a great shipper a substantial advantage by buying or renting his warehouse adjoining his factory or place of business and making it a public receiving station, thus relieving him of the expense of hauling his merchandise by wagon to its regular receiving station. And possibly under the act as it now stands we would be powerless to redress the wrong, if the public made actual use of the new station, unless the price paid or the rent reserved were excessive and the transaction was therefore intended as an unlawful rebate as well as a continuing daily advantage to that shipper. But when the carrier engages the shipper to operate his warehouse as a railroad terminal and in the arrangement gives him advantages in handling his own traffic that are denied to his competitor, the test proposed, as above described, does not satisfy the principles underlying the act, as we shall see more fully later in this report.

The complainant contends that in lightering their sugar to the Jersey shore and there delivering it to the defendants, Arbuckle Brothers perform what the complainant refers to as a purely accessorial service. We incline to

think this a sound view of the matter upon the facts shown of record. Neither the actual possession of their sugar nor their relation to it is in any respect changed until it is delivered into the physical possession of the defendants at Jersey City. This fact is clearly developed upon the record. Arbuckle Brothers handle the sugar out of their own refinery to their own dock and themselves deliver it to the defendants west of the river, using in the process only property and facilities that are owned by them and employees that are paid by them. Moreover, under the terms of the contracts between them and the defendant carriers none of the duties, obligations, responsibilities, or liabilities of common carriers attaches to the defendants, with respect to the sugar of Arbuckle Brothers, until the defendants have actually received it at their regular freight stations west of the river. Yet it is here contended that, through some sort of alchemy in their provisions, these contracts transmute Arbuckle Brothers from shippers into carriers' agents while they are in the act of delivering their own sugar to themselves at their own dock. We are not necessarily controlled, however, by the face of those documents or by the merely superficial relation that they purport to establish between these shippers and the defendant carriers, if, as seems to be abundantly clear upon a reading of their provisions, the real and actual relation of Arbuckle Brothers to the defendants, so far as their own sugar is concerned, is that of shippers, up to the moment of time when they physically deliver their sugar to the defendants on the Jersey shore. The contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk, and only from that moment does the carriers' risk begin. It is only when the defendants actually accept and physically take possession of the sugar at their receiving stations west of the river that they agree to, and do in fact, assume the liabilities of common carriers with respect to the sugar of Arbuckle Brothers.

Much therefore may be said in support of the theory that at that point and at that moment is the relation of shipper and carrier between the defendants and Arbuckle Brothers actually established, and that only at that moment of time do the mutual liabilities and responsibilities attending that relation spring into being.

When the real essence and meaning of the contracts are arrived at there seems to be no substantial difference in the manner in which the defendant carriers accept the complainant's sugar and the manner in which they accept the sugar of Arbuckle Brothers for transportation. Both companies deliver their merchandise to the defendants on the Jersey shore at their own risk, one from Jay Street and the other from Pier 24, one in lighters that it owns and the other in lighters that it hires. At that point and at that moment of time the liability of the defendants as common carriers for both shippers commences. Up to that point there is no "transportation" of sugar, as the complainant contends, but only an accessorial service by each shipper in delivering its own merchandise to the carrier for transportation. It is then that an actual contractual relation between the two refining companies as shippers and the several defendants as carriers is entered into. If therefore we are to disregard, as necessarily we must if this act is to be enforced in its letter and spirit, the merely superficial relation sought to be created on the face of the contracts in question, and turn our attention to the actual relation that they establish, the only difference, upon a most careful analysis, between the complainant with respect to its sugar and Arbuckle Brothers with respect to their sugar, is that under the contracts Arbuckle Brothers are called the agents of the defendants when handling their own sugar, and get an allowance for delivering it to the carriers across the river, while the complainant does the same thing and gets no allowance but makes the delivery at its own expense. The fact that Arbuckle Brothers ordi-

narily load their sugar into cars on the dock and sometimes float empty cars across the river for loading seems to be a mere incident to the preferred basis upon which they have been put as shippers over the defendant lines, and can not be regarded as materially differentiating them and their sugar from the complainant and its sugar shipments.

"But," say the defendants in substance, "we have converted the dock of Arbuckle Brothers into a regular freight station, and there receive a large tonnage from other shippers which Arbuckle Brothers at our expense lighter to our rail ends west of the river. We shall be glad to have them do this for the complainant, if it will deliver its sugar to us at the Arbuckle dock." This suggestion has not made a favorable impression upon us. To offer the complainant a receiving station on the dock of powerful competitors, where its shipments would be handled and billed out by competitors, thus exposing to them the names of the complainant's customers, its markets and the course of its business, is a suggestion that overlooks the duty of impartial service by the defendants to all their shipping public. Moreover, under recent amendments, the law has thrown its protection around the shipper and in express terms makes it unlawful for an interstate carrier to "disclose his business transactions to a competitor." And if effect is to be given to this wholesome principle the complaint can not be said to be satisfied by the tender to the complainant of the Arbuckle dock as a receiving station for its sugar, and the tender of Arbuckle employees, as agents of the defendants, to make out the leading papers and other transportation records, to assess and collect the freight charges, and to handle the complainant's sugar to the defendants' freight stations on the west shore. To throw a shipper in this manner into the hands of competitors in the same line of business is utterly at variance with fairness as well as with the express provisions of the law. It is true that there may be traffic as to which such a state

of affairs would make little difference. But we think it clear that the Arbuckle dock may no more be regarded as a reasonable freight depot for the complainant than would the Brooklyn Eastern District terminal, operated in the interest of the American Sugar Refining Company, be tolerated by Arbuckle Brothers as a freight station of the defendants. If its refinery were immediately across the street the complainant could not be expected to accept the Arbuckle dock as a receiving station of the defendants so long as it is operated by competitors in the same line of business. A receiving station operated by a competitor is not a reasonable facility of transportation to offer to any shipper.

So far as the general shipping public is concerned, the Arbuckle dock may doubtless now be regarded as a public receiving station of the defendants. But, if, for the reasons stated, it is not entitled to be regarded as a public receiving station so far as the complainant and its sugar are concerned, may it be regarded as any other than the private dock of Arbuckle Brothers when they, as shippers, and their own sugar are concerned? If it is operated under conditions that prevent it from being a legal receiving station for all shippers of sugar that might care to use it, we do not see how it may fairly be regarded as a public receiving station of the defendants for the sugar of Arbuckle Brothers. We have therefore been inclined, as heretofore stated, to regard the lightering of their own sugar across the river as an accessorial service by Arbuckle Brothers from their private dock, and not as a service of transportation from a public receiving station of the defendants. And this view of the matter is emphasized by the contracts, heretofore alluded to, which attach to the defendants a liability as common carriers of Arbuckle sugar only from the moment of time when they actually receive possession of it at their regular station west of the river. It is not necessary, however, to draw fine dis-

tinctions between an accessorial service and a service of transportation, as applied to the facts in this case. If the allowances made by the defendants subject the complainant to an undue discrimination, or give Arbuckle Brothers, their competitors, an unjust preference, a wrong is being done that must be redressed by an appropriate order, whether the allowances are paid as for an accessorial service or for a service of transportation. We shall therefore now consider the matter briefly from the latter point of view.

Arbuckle Brothers not only operate their dock for the defendants as a railway facility, but they also perform the lighterage service between the dock and the regular stations of the defendant on the west shore. And the defendants insist that the sugar of Arbuckle Brothers, like the general merchandise of other shippers received at their dock, commences to move at that point; and that when Arbuckle Brothers lighter their own sugar across the river they are simply performing a service of transportation with facilities of their own furnished by them for the purpose. The defendants point out that the only way they have of serving the cities of New York and Brooklyn is by a lighterage system radiating to all points within the limits that they have established in the harbor of New York; and that under their lighterage tariffs they are common carriers to and from every dock and pier within those limits. Their view, then, is that the Arbuckles have the right, instead of using their own dock, to tender their sugar to any one of the defendants at any other dock, whether public or private, within the established limits; and to require that defendant, upon the payment by them of the New York rate, to float or lighter it to its regular receiving station on the Jersey side; and therefore if the defendants, by their published tariffs, have placed themselves under the duty of lightering the Arbuckle sugar from the New York side at the New York rate, that service, when performed by one of

the defendants, is a part of its transportation service from that side of the river. The conclusion necessarily following these premises, as the defendants thereupon insist, is that the lighterage of the Arbuckle sugar from the New York side, when performed by the Arbuckles themselves, is also a service of transportation and not an accessorial service, and therefore may be paid for by the defendants under section 15 of the act on a just and reasonable basis.

We had not regarded section 15 of the act as a warrant to a carrier for making an allowance to one shipper providing a facility and performing a service in the transportation of his own property, while refusing a similar allowance to another shipper providing a similar facility and performing the same service in the transportation of his property. Nor had we understood that a carrier, while giving to one shipper the privilege of providing a facility and performing a service in the transportation of his property, could refuse the same privilege to another shipper, and compensate the former while refusing any allowance to the latter. Nor is that the law. Certainly it can not be the law when the two shippers are competitors in the same line of business and in the same markets. If the defendants accord Arbuckle Brothers the privilege of lightering their sugar from their dock and make them an allowance therefor, we regard it as axiomatic, under the principles of this legislation, that they must accord a like privilege and make a like allowance to the complainant from Pier 24, the complainant being a competitor in the same line of business and reaching the same markets of consumption. Indeed, we see little ground, upon the facts now before us, for denying the privilege and the allowances to the complainant from the point where its sugar crosses the lighterage limits established by the defendants. That, however, is a question that need not be discussed, for we have found that the complainant now lighters its sugar from Pier 24 which is within the lighterage limits.

The defendants, however, insist that the provisions of section 15 need not necessarily have so broad a construction. Their view is that the privilege of furnishing the facilities and performing a part of the transportation service may be accorded, and the payment therefor made, to one shipper without laying the carrier under the obligation of according the same privilege and making a similar payment to another and competing shipper who provides a similar facility and performs a similar service in the transportation of his property. "If the Jay Street terminal," they declare, "is to be operated as a public station, the handling of the Arbuckle shipments through the terminal and by the equipment of the terminal (*i. e.*, by the Arbuckles), as all other shipments are handled, must be viewed as a natural incident to that operation." Inasmuch as the Jay Street terminal has been established "it should be open,"they say, "to all shippers without discrimination. * * * To require the Arbuckles to deliver their shipments at some point distant from the terminal, there to be picked up and transported to the Jersey terminal by railroad equipment, would be a strained and unnatural proceeding, and a discrimination against the Arbuckles." It would be equally strained, as we are told, to require the defendants, after having made the Arbuckles their agents in operating the Jay Street terminal, to set aside that arrangement with respect to the Arbuckle sugar and handle it with railroad employees and with railroad equipment. This, they say, would be both inconvenient and expensive. From that point the argument of the defendants proceeds easily and rapidly to the proposition that, when a carrier, by an agreement with a great shipper, turns his dock into a railroad terminal and has it operated for it by the shipper, the circumstances and conditions surrounding that shipper and his particular traffic differ from the circumstances and conditions surrounding another shipper, although competing in the same line of business,

"who does not furnish public terminal facilities for the carrier;" and that such a situation justifies the carrier "in permitting the shipper who operates a public terminal for it to perform such terminal service on his own shipments while refusing to permit a shipper who does not operate a public terminal to perform a similar part of the transportation service." In other words, as we gather the point of view of the defendants, the very arrangement that makes a railroad terminal of the dock owned by, and adjoining the refinery of these shippers, and saves them the cost of teaming or otherwise conveying their immense traffic to a public terminal operated by the carriers themselves, also erects around those shippers a bulwark of dissimilar circumstances and conditions that justifies the carrier in giving them the further privilege of providing their own facilities for lightering their shipments across the river, thus performing also a part of the transportation service, and being compensated therefor by ample allowances; while the privilege is withheld from another shipper who is their competitor in the same line of business.

That contention can not be admitted as sound. On the contrary, we hold that when a carrier undertakes to have such a terminal operated for it by the owner of the property and the owner happens also to be a large shipper over its line, the law reads into the agreement between the carrier and the owner the peremptory requirement that the arrangment shall not result in any undue and unjust discrimination against other shippers competing with the owner in the same line of business. The prohibition of inequalities among shippers is perhaps more fundamental and vital than any other feature of the act. And when a carrier undertakes to supply its needs by private contract with a shipper—whatever may be its purpose, and however plainly it may be grounded in good faith, or however clearly it may spring from the practical necessities of the carrier—by giving him certain opportunities and advan-

tages in the handling of his traffic over its lines, those opportunities and advantages may not lawfully be withheld from his competitors. However straightforward the relation between a carrier and a shipper may be, it is essentially wrong, and violates the provisions of the statute against preferences and discriminations when the carrier endeavors under such a private contract to turn the shipper into its agent, and thus, whether purposely or incidentally, gives him privileges and advantages in connection with the transportation of his property that are withheld from his competitors. If such a transaction is conceived in bad faith and works unlawful results, it is manifestly unlawful. But good faith will not save it from like condemnation if it involves preferences and discriminations that are undue and unjust. It is not the intention of the parties but the actual results that flow from the arragement that constitute the test. And we find that the terms under which the defendant carriers accept the sugar of Arbuckle Brothers at their regular stations west of the river do result in inequalities, preferences, and discriminations, and are unduly and unjustly prejudicial to the rights of the complainant as a shipper of sugar over the lines of the defendants in competition with Arbuckle Brothers in the same markets.

We are told that the contention that a discrimination is being practiced against the complainant "could be forcibly urged * * * if the refinery of the complainant had been located within the lighterage limits," and that the "trouble of the complainant springs from its location without the free lighterage limits." So far as the record gives us any light on the matter the complainant is not seeking to ship its refinery over the lines of these defendants; the whereabouts of the refinery is therefore wholly non-essential and of no possible concern to anyone. It is the sugar that the complainant is offering for shipment and it is offered from a point that is within the lighterage limits. It may

have been manufactured in the Philippines, or brought in from Porto Rico, or imported from Germany. This particular sugar happens to have been refined at Yonkers. But wherever it may have been made, the relevant fact from a transportation point of view is that at a given moment a quantity of sugar is at Pier 24 ready for shipment to interstate destinations on the lines of these defendants. It matters not how it got there, whether by lighter or by cart or by wheelbarrow; it is ready for shipment at that point. At the same time a like quantity of sugar is ready at the Arbuckle dock for shipment over the same lines and to compete in the same markets. Under every principle of equality embodied in this legislation the defendants must deal with the two shippers on exactly equal terms. They must themselves lighter the sugar to their regular freight stations across the river with their own equipment, or must accord to each shipper the privilege of doing the lightering in his own way; and if under section 15, or under any other provision of the act, they pay an allowance to one of the two shippers, on the theory that he has furnished a facility and performed a part of the transportation service for the defendants, they must make a like allowance to the other shipper who has done precisely the same thing. To say that the defendants have made an agent of one shipper to do the lightering for it and have not established that relation with the other serves but to emphasize the discrimination, and seems neither to reach the equity and common justice of the situation, nor to constitute even a superficial compliance with the equality of privilege, service, and rate that the law requires of carriers in their contact with interstate shippers.

The sugar of the two competing shippers gets into the actual physical possession of the defendants on the Jersey shore under practically similar conditions, and if, as the defendants contend, the Arbuckle sugar commences to move at the Arbuckle dock, it must be remembered that

the defendants also contend that their transportation for the general public also extends to and commences at every other pier and dock within the lighterage limits that they have established. If, then, the defendants permit Arbuckle Brothers to furnish the lighterage facilities for their own sugar and perform the lighterage service across the river, and if this is to be regarded as a part of the transportation offered by the defendants under their tariffs, it is difficult to see upon what theory the defendants may defend their refusal to recognize the lighters hired by the complainant as its facilities in performing for the defendants a similar part of the transportation service. It seems to us very clear that the payment of allowances to one of these competing shippers, for a service of transportation alleged to be performed by them for the defendants with their own facilities, creates a present actual and substantial inequality that is unlawful under the act, when similar allowances are refused to the other and competing shipper for an exactly similar service. The suggestion that if the Arbuckle dock should now be purchased, or rented and operated by the defendants, and if the defendants should use their own lighters in moving the Arbuckle sugar across the river, the disadvantage under which the complainant rests would not be removed, does not meet the conditions that actually exist and which, in our judgment, present an actual present undue discrimination in the relations of the defendants with the two shippers. The Arbuckle sugar moves either from the Jersey side or the New York side of the river. If its transportation commences at the New York side, as the defendants contend, then it appears that Arbuckle Brothers, besides being paid for using their own dock as a receiving station for their own sugar, are also accorded the privilege of providing the lighters and performing a part of the transportation service on the sugar, namely, from the dock to the regular receiving stations of the defendants west of

the river; it also appears that they are well and amply paid for this service and the use of their facilities. The complainant, on the other hand, does precisely the same thing from another dock within the lighterage limits and is refused any compensation at all. That is the actual situation before us as revealed upon the record. And it is that situation with which we must deal. We shall not undertake at this time to consider what rate question or other problem might be presented if the defendants should buy or lease and operate the Jay Street terminal for themselves and perform the lighterage to and from that terminal with their own equipment and with their own employees. If the present allowances paid to Arbuckle Brothers are a fair measure of what it would really cost the defendants to put the Arbuckle sugar on the Jersey side with their own equipment, the question might arise as to the reasonableness, from the standpoint of these competing refineries, of having identical rates on sugar from both sides of the river. But no such question is before us at this time.

On the whole record we hold that when the complainant, as hereinbefore described, tenders its sugar to the defendants on lighters at their regular receiving stations on the Jersey shore it must be received and carried thence to destination on rates, terms, and conditions that are no less favorable to the complainant in any particular than the rates, terms, and conditions governing and surrounding the sugar traffic of Arbuckle Brothers brought by them on floats and lighters to the same stations for carriage to the same destination.

The complainant also charges that a similar allowance paid to the owners of the so-called Brooklyn Eastern District terminal, owned by Havemeyer interests, also subjects it to undue prejudice and disadvantage. It is at this dock that the output of the American Sugar Refining Company is largely handled. But, although our understanding had been to the contrary, we were told at the hearing that the

Havemeyers owned only an insignificant amount of the capital stock of that company. Accepting these statements at their face value, we need not at this time consider that phase of the complaint. Nor, in view of our conclusions herein, is it necessary to consider the petition for a rehearing of the former case under this title to which allusion has been made.

An order will be entered in conformity with these conclusions; and upon the filing of a detailed statement properly checked by the defendants a further order will be entered allowing reparation to the complainant in accordance with the prayer of its petition.

KNAPP, *Chairman*, dissenting:

I do not perceive that the record in this case presents any different question from the one decided in the former case between the same partis, 17 I. C. C. Rep., 40. Indeed, in one aspect the facts now presented seem to me less favorable to complainant, since it appears in this proceeding, by the explicit avowal of its counsel during the oral argument, that the transfer of the Jay Street terminal to the defendant carriers and its operation by them would result in no benefit to complainant. This being so, as must be assumed from the admission made, I do not see how the ownership and operation of that terminal by Arbuckle Brothers constitutes undue preference to them or undue prejudice to complainant. I therefore dissent upon the general grounds set forth in the majority report in the former case.

PROUTY, *Commissioner*, also dissenting:

I do not agree to the disposition made of this case, and while the opinion of the Commission in the original case, *Federal Sugar Refining Co.* v. *B. & O. R. R. Co.*, 17 I. C. C. Rep., 40, gives a correct and perhaps sufficient account of the question presented, I wish to add a word in view of the claim that this record presents a new state of facts.

So far as disclosed there are three sugar refineries in New York and vicinity, namely, the Federal Sugar Refining Company, the complainant, whose factory is located at Yonkers, N. Y., and Arbuckle Brothers, and the American Sugar Refining Company, the factories of the two latter being located in Brooklyn, N. Y. The complainant contends that the defendants by their rates discriminate against it in favor of its two competitors.

Yonkers, where the factory of the complainant is located, is without the free lighterage limits of New York, while the plants of Arbuckle Brothers and the American Sugar Refining Company are both situated within those limits. The original complaint alleged that Yonkers should also be included within these lighterage limits, and the discrimination alleged in that complaint was the failure of the defendants to so extend their lighterage service.

Upon a full presentation of the matter the Commission held that the New York lighterage limits ought not to be extended to include Yonkers, and that the defendants were within their lawful rights in declining to embrace the factory of the complainant within those limits. This must be kept continually in mind.

It is equally important to have ever in view the full significance of that holding. From all points within the lighterage limits the New York rate of the defendants applies, but that rate does not apply from points without those limits unless the point is located upon the line of some one of the defendants. Under this rule, the propriety of which is unquestioned, the American Sugar Refining Company and Arbuckle Brothers are entitled to have their sugar lightered free at the New York rate to the rail termini of the defendants in Jersey City and Hoboken.

The plant of the complainant at Yonkers is upon the tracks of the New York Central system, and its product for all points reached through that system and its connections can be loaded from the storehouse into the car, but there are many points which can not be satisfactorily

reached by this route, and for which complainant finds it necessary to make use of the lines of the defendants; and in that event the sugar of the complainants must be transported by lighter from the plant at Yonkers to the rail termini at Jersey City, in the same way that the sugar of its competitors must be lightered from their plants to Jersey City, but inasmuch as its plant is without the free lighterage limits the complainant is put to the expense of that lighter service.

Arbuckle Brothers and the American Sugar Refining Company have therefore a transportation advantage over the complainant with respect to their sugar shipped by the defendant lines through Jersey City, which arises out of the location of their plants and which this Commission has held and still holds is legitimate. The Federal Sugar Refining Company has, doubtless, from its location at Yonkers certain advantages over its rivals. Its factory may have cost it less; its rents may be less; it may find labor conditions more favorable. It has immediate access to the rails of one of the great railroad systems of this continent and for all points upon that system or its connections its product can be transferred from the warehouse to the car. But to offset these advantages it labors under the transportation disadvantage of being compelled to lighter its own product to Jersey City, while the product of its rival is carried free.

It is repeated through page after page of the majority opinion that the complainant is at a transportation disadvantage in comparison with its competitor, Arbuckle Brothers. Most certainly it is, and this Commission has held that this advantage is not improper.

Starting, then, with the proposition that with respect to all sugar handled over the lines of the defendants through their rail terminals upon the west bank of the Hudson River, the complainant is properly at a disadvantage as compared with its competitors located in Brooklyn, it may be asked, What further disadvantage against the complain-

ant does the record in this case disclose? If any, it arises out of the following situation:

Arbuckle Brothers own an extensive dock in Brooklyn and the floating equipment for lightering to and from that dock. An arrangement has been made by these defendants with Arbuckle Brothers under the terms of which traffic of all kinds is handled over this dock to and from the rail termini of the defendants at Jersey City. The dock is known as the Jay Street terminal of these defendants. Arbuckle Brothers are the agents of the various defendants in the operation of that terminal. As compensation for the lightering of this traffic and the transaction of the terminal business connected with receiving and delivering the same, Arbuckle Brothers are paid a fixed sum per 100 pounds, which is 3 cents where the traffic is intended for certain destinations and $4\frac{1}{2}$ cents for certain other destinations.

With respect to this contract certain facts should be noted.

It applies to all traffic of all kinds, both in and out, originating at or intended for that part of Brooklyn. As I remember the testimony about one-third of the outbound traffic consists of the product of Arbuckle Brothers, the other two-thirds being miscellaneous business. A much less per cent of inbound business is for Arbuckle Brothers.

When outbound traffic is presented for shipment over the line of one of the defendants a bill of lading is issued in the name of that defendant. This is, of course, signed by an employee of Arbuckle Brothers for the railroad company, but it is in all respects the act of the company and binding upon it. If, for example, a consignment of sugar were to be offered for shipment by Arbuckle Brothers over the line of one of these defendants and if that sugar were lost in transit from the dock to the Jersey shore, the railroad would be responsible to the consignee for the delivery of the property. Under the contract between Arbuckle Brothers and the railroad, the railroad would have

a claim against Abuckle Brothers for the amount of the loss, but, as between the shipper and the railroad, Arbuckle Brothers are unknown.

The price paid is by the hundred pounds and depends not on the character of the traffic but on the destination, being 3 cents per 100 pounds in some instances, and $4\frac{1}{2}$ cents in others. It is in no sense an allowance to Arbuckle Brothers for the lighterage of their sugar, except as that sugar may constitute about one-third of the total outbound business handled through that terminal.

The case finds, and this is not disputed, that under the actual working of this contract Arbuckle Brothers do not receive an excessive return for the service performed.

Just how, then, does this contract violate the act to regulate commerce?

To permit a shipper to receive from a railroad compensation for any part of the service of transportation undertaken by the railroad is a fruitful source of favoritism and discrimination. This has always been recognized by all students of the subject, and Congress, in view of this fact, might very well have prohibited all transactions of this kind. Had it done so the mere fact that Arbuckle Brothers are the owners of a substantial part of the traffic moving through this terminal would render the operation of the contract unlawful.

Congress has not done this. The Commission in calling the attention of Congress to the wrongs which grew out of this connection between the shipper and the railroad, itself stated that there might be instances in which it was for the interest of the general public that some portion of the transportation service should be performed by the owner of the property, and that, for this reason, the better way seemed to be to make sure that the compensation paid the shipper for the performance of this service was not extravagant. Whether influenced by this suggestion or not, Congress did, in the Hepburn amendment of 1906, provide that where the shipper rendered a part of the transportation service the

Commission might inquire what would be a reasonable compensation for that service and fix a limit which should not be exceeded by the carrier, thereby expressly recognizing the right of the carrier to employ the shipper about the transportation of his own property, provided the compensation paid for that service was not unreasonable.

This very instance before us furnishes a good illustration of the necessity for this provision. Dockage property in Brooklyn is extremely valuable, and it might be both difficult and expensive for these various defendants to create proper freight terminals in that locality. This dock with its floating equipment was available. It gave to the public facilities much needed, and it enabled the defendants to provide those facilities on favorable terms to themselves. There is no apparent reason why these defendants should not be allowed to select this economical and efficient method of affording adequate public facilities for receiving and delivering freight in this locality, unless some wrong is done to some member of the shipping public.

While, however, it seems plain to me that Congress has not prohibited arrangements of this kind when no element of wrong is involved, I do not think that such a situation is lawful if it creates an undue discrimination in favor of the party who handles the business and receives the compensation, even though the compensation be not excessive. There is, therefore, the further question of fact, Does the operation of this contract give to Arbuckle Brothers an advantage over the Federal Sugar Refining Company? If it does, in my opinion it should be prohibited; if it does not, then in the interest of the public and of these defendants, it should be sanctioned.

It is said that Arbuckle Brothers get free transportation for their sugar from this dock to Jersey City, while the complainant is obliged to lighter its sugar at its own expense. This certainly is true, but for the reason that the factory of Arbuckle Brothers is within the lighterage

limits while that of the complainant is without—a situation which this Commission has approved.

It is suggested that Arbuckle Brothers are large shippers, while the complainant is a small shipper. The record does not show the relative shipments of these two refineries; nor did I suppose that this was material. It has been my understanding that under this act which we administer great shippers and small shippers stand exactly alike. I had not supposed hitherto that if a great shipper happened to be located within the free lighterage limits of New York his greatness was a reason for depriving him of the benefit of free lighterage.

It is said that Arbuckle Brothers handle their own sugar. But how does this benefit Arbuckle Brothers, provided the sum which they receive for that service is no more than a reasonable one?

It is urged that the compensation paid is more than is reasonable. It is quite possible that the amount received per 100 pounds for handling this sugar is more than would be just if nothing but the Arbuckle sugar was handled through the Jay Street terminal, but the contract for the operation of that terminal applies to the entire traffic, of which the Arbuckle sugar is but a fraction. That traffic is of all kinds and the expense of handling some kinds much exceeds that of others. What Arbuckle Brothers gain on sugar is lost on other kinds of business, provided the entire result is not too favorable. If the defendants have a legal right to make this arrangement we must, in passing upon it, consider it as a whole, and not select a particular item of traffic in inquiring whether the price paid for the service is too high.

Several things conclusively show that the trouble of the complainant springs from its location without the free lighterage limits, and not from the circumstance that the Jay Street terminal is operated by Arbuckle Brothers.

Counsel for the complainant deliberately stated upon the argument that his client would be in no respect bene-

fited if the operation of that terminal were to pass into the hands of a third party or were to be taken over by the defendants themselves. If, then, the complainant is not damaged by the arrangement as it exists, why should we interfere with that arrangement which appears to be for the common benefit of the public and of the railways?

The situation of the American Sugar Refining Company is equally in point. Most of the raw sugar which is refined is received or may be received by water, and much of the product may be sent out by water. A sugar refinery is almost of necessity accessible to extensive dockage facilities, and this is true in case of the American Company. These docks were owned and operated by Havemeyer, the president of that company, and the complainant made the same claim upon the hearing with respect to the Sugar Trust that it made with respect to Arbuckle Brothers, upon the theory that Havemeyer was the principal owner of the American Sugar Refining Company. It turned out in evidence that the stock holdings of Mr. Havemeyer in that company were insignificant, and his connection with the company has since been entirely severed, so that, to-day, there is no community of ownership between the person operating the terminal through which its sugar is handled and the refining company itself.

It was practically conceded by the complainant, and is perfectly evident without any concession that the American Sugar Refining Company enjoys, under the present arrangement, precisely the same advantage over the complainant as do Arbuckle Brothers, and it is further evident that both companies would enjoy this advantage were Arbuckle Brothers compelled to retire from the operation of the Jay Street terminal.

It may be suggested in this connection that the Sugar Trust would not be likely to sit idly by if the arrangement at the Jay Street terminal worked a discrimination against it, in favor of its most active rival.

Since the promulgation of the opinion of the Commission in the original case a new feature has been introduced into this situation, to which, perhaps, some reference should be made.

Originally the complainant lightered its sugar from its factory at Yonkers to the rail termini of the defendants at Jersey City by the steamer *Ben Franklin*. The various packages were marked by the complainant and put on board the steamer at Yonkers. The skipper was provided with bills of lading or receipts for signature by the various railroads over which the shipments were to pass, and he transported these packages from Yonkers to Jersey City, made delivery to the various railroads, and obtained his receipts, which were returned to the complainant.

At the present time the packages are marked and loaded upon the *Ben Franklin* at Yonkers, precisely as before; but the cargo is now consigned to the complainant at Pier 24, which is on the New York side of the Hudson River and within the lighterage limits. The steamer proceeds to Pier 24 and ties up, whereupon a representative of the complainant steps on board, gives the captain of the *Ben Franklin* a receipt for his cargo, and delivers to him the blank receipts or bills of lading which were formerly put into his possession at Yonkers. After this has been done the steamer proceeds to Jersey City and makes delivery to the various rail lines.

It is claimed by this complainant, and apparently found by the Commission, that this amounts to a transportation of this sugar from Pier 24 to Jersey City.

The transaction, in fact, is precisely the same now that it was formerly, except that the steamer now stops at Pier 24. Great stress is laid in the opinion upon the fact that the *Ben Franklin* is actually made fast to the wharf, but to my own mind it would subserve exactly the same purpose if she were to whistle in midstream when passing that pier. It is impossible for me to understand how any performance of this character can change the actual rela-

tion of these parties when the thing accomplished is in both cases identical.

If the complainant saw fit to put its sugar onto Pier 24 and to notify the defendants to come there and receive it, a different question might be presented. Their traffic would then be within the free lighterage limits, and it is possible that, having selected docks adjacent to the refineries of the competitors of this complainant, the defendants could not refuse to take the sugar upon this dock.

In order to avoid all misapprehension, let me repeat that we ought not, in my opinion, to sanction the arrangement for the operation of the Jay Street terminal, if that results in discrimination against this complainant. It is evident that this situation might take various forms, where it could be forcibly urged that such discrimination existed. If, for example, the refinery of this complainant had been located within the lighterage limits, and these defendants by selecting for their terminals in Brooklyn docks adjacent to the refineries of its two competitors had compelled this complainant as a practical matter to lighter its product to the Jersey shore, either because that could be done more cheaply than to deliver it at the Brooklyn terminals or because those terminals were operated by its competitors, who, by handling the traffic of the complainant, would acquire an improper knowledge of its business, serious questions would be presented; but there is nothing of the kind in this case. The only disadvantage here which has been pointed out or which can be pointed out arises from the location of the complainant without the lighterage limits. That was its complaint in the original case, and that is the gravamen of its complaint here. Since the Commission has decided that the free lighterage limits of New York ought not to be extended so as to include Yonkers, and since it appears that the arrangement at the Jay Street terminal is in the general public interest, I do not think this Commission should make any order which will prevent these defendants from continuing that arrangement.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of December, A. D. 1910.

Present:

Martin A. Knapp,	Commissioners
Judson C. Clements,	
Charles A. Prouty,	
Francis M. Cockrell,	
Franklin K. Lane,	
Edgar E. Clark,	
James S. Harlan,	

No. 2888.

FEDERAL SUGAR REFINING COMPANY

v.

THE BALTIMORE & OHIO RAILROAD COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; ERIE RAILROAD COMPANY; LEHIGH VALLEY RAILROAD COMPANY; NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY; AND THE PENNSYLVANIA RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof,

and having found that the allowances paid by the above-named defendants to Arbuckle Brothers on their sugar brought by them on floats from lighters to the regular terminals of defendants on the Jersey shore in the state of New Jersey, while at the same time paying no such allowances to complainant on its sugar brought by it on lighters to the defendants' said regular terminals on the Jersey shore, unduly discriminate against said complainants and unduly prefer said Arbuckle Brothers, in violation of the act to regular commerce:

It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain, from paying such allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowances to said complainant on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce.

19

IN THE

Supreme Court of the United States.

No. 722.—October Term, 1911.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, AND THE FEDERAL SUGAR REFINING COMPANY,
Appellants,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, ET AL.,
Appellees.

Reply Brief for Railroad Companies, Appellees.

GEO. F. BROWNELL,
HERBERT A. TAYLOR,
Solicitors for the Railroad Companies, Appellees.

IN THE

Supreme Court of the United States.

No. 722.—October Term, 1911.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, AND THE FEDERAL SUGAR REFINING COMPANY,
Appellants,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, ET AL.,
Appellees.

Reply Brief for Railroad Companies, Appellees.

The brief for the United States was not received until January 8th, too late to be considered before our main brief was printed, and we therefore file this reply brief.

Unless otherwise stated, references herein are to the pages of the learned Solicitor General's brief, and italics are ours.

The many epithets and charges of unlawful acts contained in the brief are without foundation in fact, and evidently result from a misconception of the facts in the case by the learned counsel for the Government.

It is stated that "the matters of fact and substance in the case" are those recited on pages 4 to 6. All others are apparently characterized as "things of sham and shadow, designed to obscure the matters of fact and substance," although the Commission has found them to be matters of fact and substance.

It is stated (6) that the limit of free lighterage is such a "sham and shadow." The fact is to the contrary, and was so found by the Commission.

It is stated that none of the railroad companies have for many years lightered sugar across the harbor (6). This statement is not justified by the record and is contrary to the fact.

It is incorrectly stated that the services of the Jay Street Terminal, the Brooklyn Eastern District Terminal, and the Ben Franklin Company, in bringing sugar to the New Jersey stations are "the same so far as concerns the railroad companies, and that the only difference is that in the case of the Arbuckle sugar, the cost of lighterage depends upon the length of haul by the railroad companies." (7, 8.) The fact is that the services performed by the District Terminal and the Jay Street Terminal for the railroad companies differ greatly from the lighterage service performed by the Ben Franklin Company for the Federal Company; and the payments made therefor to the Jay Street Terminal are identical with those paid to all the other terminal companies, in none of which is any shipper interested, and which payments are concededly reasonable.

It is stated (8) that the allegation of the appellees, in their bill, that "among other terminal freight stations established by them within the said lighterage limits is the Jay Street Terminal," is not true "even in a formal sense." It is a fact alleged in the bill, and, moreover, one found by the Commission, and hitherto undisputed.

It is stated (10, 11, 30) that while "Arbuckle Brothers, in connection with their refinery, own and operate a shipping plant, with all its incidents, and lighter their own sugar across the harbor to the Jersey terminals of the railroads," and the Federal Company does not own shipping facilities as extensive as those of Arbuckle Brothers, yet "it provides them by hiring, and it does just what its competitor does," and the railroad company "cannot adopt

the Arbuckle Brothers' plant as one of its public terminals and refuse to adopt for the same purposes the plant of a competitor, when the result is to create marked discrimination." These statements are erroneous, and indicate a complete misapprehension of the facts.

It is stated (11, 13, 14) that the railroad companies could and should have acquired New York City terminals by eminent domain, instead of contracting with the terminal companies therefor. The fact is they had no such power of eminent domain in New York City.

The railroad companies had the right to furnish station facilities, by contract, at any point, through a medium chosen by themselves, and it is to be assumed, in the absence of proof to the contrary, that in fixing the limits they comprised only a territory within which only one station would be required. No one could be expected to invest the capital and establish the organization necessary to conduct a big union terminal without some assurance that another would not be planted next door by the same companies.

The learned counsel for the Government contends (11, 16–18) that the employment by the railroad companies of Jay Street station as a terminal station, so far as the Arbuckle Brothers' shipments are concerned, is "against public policy and public law," in that it violates (*a*) the commodities clause of the Interstate Commerce Act, and (*b*) the provision of section 15, forbidding certain disclosures as to shipments save with consent of shipper or consignee; and that what is done completely nullifies those provisions, and "is expiicitly forbidden by law." No suggestion that either of these provisions was violated was before the Commission, or considered by it or made the basis of its conclusions or order. Neither provision has any application to the case, but if the "non-disclosure" provision of Sec. 15 could apply it would be a *non-sequiter* that, as a consequence (18) "the Jay Street Terminal cannot as to the business of Arbuckle Brothers be deemed a

public terminal of the railroad companies, and delivery by Arbuckle Brothers is therefore not made to the companies at that place, but at the Jersey stations, and the transportation by the railroad companies begins at the Jersey shores." On the contrary, in such case the consequence would be, rather, that the illegality, if any, of the arrangement would attach only to shipments made by shippers other than Arbuckle Brothers.

The Commission would have no power in case it found a violation of either of those provisions to prescribe as the "just, fair and reasonable" practice to be thereafter followed (§ 15, I. C. Act) the continuance of the unlawful practice, provided, only, that the carrier commit a like violation of law in favor of one more shipper, as the order in the present case prescribes.

Counsel for the Government does not attempt to argue that the order of the Commission can be sustained upon the theory that there was a violation of Sec. 3, forbidding undue or unreasonable preferences or advantages, or that the conclusions of the Commission were based on that theory.

The Government rests the case, so far as the claims of violation of law which were before the Commission are concerned, entirely on the contention that the Arbuckle Brothers shipments, as well as those of the Federal Company, were delivered to the railroad companies at their New Jersey stations, and not elsewhere (10); "that the transportation by the railroad companies begins at the Jersey shores (18): that the service performed by Jay Street Terminal was not a transportation service, and the payment therefore was an unlawful allowance, and that "In simple truth the parties forgot to tuck in the ears of the *rebate* when they put over it the sham cover of transportation service," (18); and that the Commission determined that this was "a discrimination against the Federal Company and in favor of Arbuckle Brothers (6).

It is not clear what provision of law the Government

conceives the Commission to have found to be violated, but, apparently, it is Sec. 2, forbidding "unjust discrimination," as defined therein.

The Commission's report contains no conclusions showing a violation of Sec. 2, and if it did, such conclusions would be erroneous as a matter of law. (See main brief.)

If, as contended, the railroad transportation of Arbuckle Brothers shipments begins in New Jersey, then the large volume of such shipments consigned to points in the State of New Jersey are *intrastate* and not *interstate* shipments, and are without the jurisdiction of the Commission, notwithstanding that the railroad companies' bills of lading have been issued showing shipment from New York, and notwithstanding the other facts in the case. In such case the order is erroneous, because it undertakes to prohibit payment for handling any shipments of Arbuckle Brothers, without excepting such intrastate shipments to points in New Jersey, unless like payments are made to the Federal Company; and it is also erroneous because it requires as such alternative the payment of such amounts to the Federal Conpany on all its shipments, including those consigned to points in New Jersey, which are concededly *intrastate*.

I.

COUNSEL FOR THE GOVERNMENT RECOGNIZES THAT THE ORDER, IN EFFECT, REQUIRES THESE APPPELEES TO EXTEND THEIR LINES TO YONKERS BY REQUIRING THEM TO PAY MORE THAN THE COST OF BRINGING THE FEDERAL COMPANY'S SUGAR FROM YONKERS, AND SEEKS TO JUSTIFY IT BY ASSERTING THAT THE COMMISSION DID NOT BASE ITS CONCLUSIONS AND ORDER ON THE UNDERSTANDING THAT BY THE DEVICE ADOPTED BY THE FEDERAL COMPANY THE SHIPMENT FROM YONKERS TERMINATED AT PIER 24, AND A NEW SHIPMENT ORIGINATED AT PIER 24.

It is asserted (28) that the order on the first petition was wrong and was overruled by the Commission upon

its merits, and it is on that view that the Government seeks to sustain the Commission's action.

This view, however, is not sustained by the report and is contrary to the position taken by the Federal Company before the Commission, and by all parties including the Commission and the Government in the Court of Commerce. The keystone of the Federal Company's complaint in the proceeding before the Commission and of its report was that the Federal sugar shipments now originate at Pier 24, a point within New York City lighterage, thereby differentiating the case from the original case, and enabling the Commission to award the relief indicated in the Commission's Report and order.

The statement that the order on the first petition was set aside is unwarranted and not sustained by the record.

In the original case it was held (Record, 25 *et seq.*):

> "1. By their lighterage regulations defendants have, in the only available manner, extended their lines to New York, but such extension results from the exercise of business discretion, not from compliance with any requirement of the act to regulate commerce; and by such extension defendants incur no liability under the act to extend their lines to Yonkers or other nearby communities.
>
> "2. The identity of ownership between Jay Street Terminal in Brooklyn and the adjoining refinery in Brooklyn is a relationship which should be subjected to the closest scrutiny. The only inference which can be drawn from the present record is that the Jay Street Terminal does not earn in excess of a reasonable return upon the investment. The 15th section of the act clearly implies that a just and reasonable allowance may be made to the owner of property transported when such owner renders a service connected with or furnishes an instrumentality used in the transportation, and nothing has been made to appear which indicates that the allowance in question exceeds the authorized measure of compensation."

Commissioner Clark, concurring (Record, 33), states that he fully agrees with the views of the majority on the question of extending lighterage limits to Yonkers, and also with the conclusion of the majority report that the railroad companies should not be required to pay complainant for lighterage to their terminals in the lighterage limits. He bases that view "upon the fact that complainant's factory is outside the lighterage limits, and that therefore no obligation rests upon the defendants to either go and get complainant's shipments or hire another to perform that service," and states that if complainant were a shipper within lighterage limits, it would be entitled to relief.

The only theory on which the conclusions and order of the Commission in the present case are based is that the Federal Company is now a shipper within lighterage limits and consequently entitled to relief.

It is stated in the report (Record, p. 45): "*A careful examination of the report of the majority in the original case and of the concurring and dissenting opinions will conduce to a more accurate understanding of the case*, as well as the grounds on which were based the divergent views entertained in the Commission upon the facts then before us."

The Commission after holding that the Federal Company shipments in legal effect originate at Pier 24 and that the carriers, therefore, must accord them an allowance, says:

"Indeed, we see little ground, upon the facts now before us, for denying the privilege and the allowances to the complainant from the point where its sugar crosses the lighterage limits established by the defendants. *That, however, is a question that need not be discussed, for we have found that the complainant now lighters its sugar from Pier 24, which is within lighterage limits.*" (Record, p. 56.)

This would seem to dispose of the contention that "the Commission did not base its action on this changed mode

of business by the Federal Company," but overruled its first decision and based its action on such reversal.

The Commission further found that in view of their conclusions in the Report in the present case, it was unnecessary "to consider the petition for a rehearing of the former case." (Record, p. 60.)

II.

THE COMMISSION'S ORDER IS BEYOND ITS POWER, AND IS BASED ON MISTAKES AND MISCONCEPTIONS OF LAW. WE ARE NOT ATTEMPTING TO REVIEW THE WISDOM OF CONGRESS IN CONFERRING UPON THE COMMISSION THE POWERS WHICH HAVE BEEN LODGED IN THAT BODY, OR TO SUBSTITUTE THE JUDGMENT OF THE COURT FOR THE JUDGMENT OF THE COMMISSION ON MATTERS WITHIN ITS PROPER DISCRETION ON FACTS PROPERLY FOUND; NEITHER DO WE ATTACK, OR INVOKE THE EXERCISE OF UNWARRANTED JUDICIAL POWERS TO REVIEW, THE WISDOM OR EXPEDIENCY OF THE COMMISSION'S ACTION IN THE PROPER PERFORMANCE OF THE ADMINISTRATIVE FUNCTIONS VESTED IN IT. BUT A THING THAT AS A MATTER OF LAW IS NOT TRUE, CANNOT BE SAID TO BE TRUE AS A MATTER OF FACT.

The Commission is a body of broad and varied powers, but mostly administrative in their character, and its powers and duties go hand in hand. In determining and prescribing, *in a proper case,* just and reasonable charges and regulations for the future, it exercises a legislative function, but most of its functions, including the performance of its duty to inquire into alleged violations of law, and, when they exist, to put an end to them, and to enforce the prohibitions of the law, are in no sense legislative, but are purely administrative.

It is its duty to consider complaints as to violations of the law, and to enforce the law. It has no power to perpetuate, either conditionally or unconditionally, that which is prohibited and declared by the statute to be un-

lawful. To do this is beyond the lawful scope of its orders. Any such violation of the act is made a misdemeanor, punishable by heavy fines, and, in case of an unlawful discrimination in charges, or of rebating, the offender is also liable to imprisonment. (Sec. 10).

It may order the offenders "to cease and desist" from any such violation, and for failure or refusal to comply with its lawful orders, heavy penalties are imposed; and it may enforce its orders through the Commerce Court.

It must (sec. 12) execute and enforce the provisions of the Act, and may call on the Department of Justice to prosecute proceedings for their enforcement and for the punishment of all violations thereof.

The Federal Company filed its complaint with the Commission, under sec. 13 of the act, charging the railroad companies with exaction of "unjust and unreasonable rates," with "unjust discrimination," and with subjecting it to "undue and unreasonable prejudice," in violation of sections 1, 2 and 3, respectively.

The carriers answered the complaint, and hearing thereon followed, as provided in sec. 13. Sec. 14 requires the Commission in such case to "make a report in writing in respect thereto, which *shall state the conclusions* of the Commission, together with its decision, order or requirement in the premises; and in case damages are awarded *such report shall include the findingsof fact* on which the award was made.

The Report in this case would seem to award damages. It provides (Record, 60): "Upon filing of a detailed statement, properly checked by the defendants, *a further order* will be entered, allowing reparation to complainant, in accordance with the prayer of its petition." The Report did not include findings of fact which comply with such requirement, if applicable.

By sec. 16 such findings of fact are made *prima facie* evidence of the factsstated therein in certain cases.

Whatever other conclusions and findings the Report

must contain to comply with the statute and afford a lawful basis for a proper order, it must at least contain conclusions clearly showing the specific provision or provisions of law, if any, which the carriers are found to have violated, the respects in which they have been violated, and the acts or things which are held to constitute such violation.

Section 15 provides that when "after full hearing upon a complaint" the Commission "shall be of opinion" that any charges, practices, etc., of the carriers are "unjust or unreasonable" [under sec. 1], or "unjustly discriminatory" [under sec. 2], or "unduly preferential or prejudicial" [under sec. 3] or otherwise in violation of any of the provisions of the act, the Commission is empowered to prescribe what practice, etc., is "*just, fair and reasonable, to be thereafter followed, and to make an order that the carrier shall cease and desist from such violation* to the extent to which the Commission finds the same to exist."

The Commission is not empowered by the act or otherwise to make an order providing for the continuation of a violation of law provided the carrier also violate it in favor of another party,—as does the order complained of.

The report states no conclusions which would support an order based on a supposed violation of sec. 2.

By that section the charging or receiving from any person a greater or less compensation for any service rendered in the transportation of property, subject to the provisions of the act, than it charges or receives from any other person for doing him (*a*) a like and contemporaneous service, (*b*) in the transportation of a like kind of traffic (*c*) under substantially similar circumstances and conditions is defined as being "unjust discrimination" and prohibited, and declared to be unlawful.

The Government seeking to sustain the order as being based on "unjust discrimination" in violation of sec. 2, appreciates that section 2 has no application unless it is

found, and properly found, that the railroad transportation service on both the Arbuckle Brothers' shipments and the Federal Company shipments began only at the Jersey City, Hoboken and Weehawken Stations of the respective companies in New Jersey, and that all the services performed by Jay Street Terminal in New York and in floating the shipments to such New Jersey stations were accessoral services and not part of the transportation service.

There are, of course, many things which may, in a general sense, be discrimination, and some of these may violate other provisions of the act without constituting the "unjust discrimination" defined in sec. 2. It is to be presumed that the former are what the Commission had in mind in much of the general discussion in the Report.

The order clearly cannot be sustained as properly based upon "unjust discrimination" in violation of section 2.

The order cannot be sustained as being properly based on a violation of section 3.

There can be no violation of sec. 3, unless the carriers have given Arbuckle Brothers an undue or unreasonable preference or advantage, thereby subjecting the Federal Company to undue or unreasonable prejudice or disadvantages.

Disadvantages to which the Federal Company is subjected by reason of its location at Yonkers as well as all disadvantages it is subjected to other than by these appellees cannot be brought under sec. 3, any more than could the advantage the Federal Company secures over its New York City competitors through its Yonkers location on the tracks of the New York Central, its cheap water front, etc., be complained of by Arbuckle Brothers, or other New York refiners as undue advantages given the Federal Company by the New York Central Company.

It is not even every disadvantage to which a person

may be subjected by a carrier that would offend the act; but only such as might properly be found to be undue or unreasonable.

To make out "undue prejudice" in this case, it must first be established

(*a*) that the Federal Company shipments from Yonkers are no longer *interstate* shipments to New Jersey, but that there is now, first, an independent *intrastate* shipment to and delivery at Pier 24, and then a second shipment originating at Pier 24, and

(*b*) that the carriers are giving Arbuckle Brothers such undue preference with respect to their shipments from Jay Street Terminal that it would subject the Federal Company to undue prejudice if it were not given the privilege of lightering, by itself or by its agents, its own shipments and receiving an allowance from the carriers threfor.

Whether these shipments were shipments originating at Pier 24, within New York ligtherage limits was conceded by counsel for the Commission on the argument in the court below to be a question of law.

The Commission clearly erred in holding that they did originate there, and the order based on that conclusion is void.

But even if there had been a delivery to the Federal Company at Pier 24 and a new shipment originating there, the only respect in which it is even suggested that the railroad companies have given Arbuckle Brothers a preference or advantage is that such companies, in common with numerous other carriers, have employed Arbuckle and Jamison, (comprising the firm of "Jay Street Terminal," as well as the firm of "Arbuckle Brothers") to provide a union terminal station and certain instrumentalities used in transportation, and to render certain services connected with the transportation of the traffic handled through such Terminal Station, including the floatage, or, in some cases, the lighterage of the traffic from such

Terminal Station to the rail stations of the respective companies at Jersey City and other points on the New Jersey shore.

No claim is made that the Federal Company is subjected to any disadvantage because the carriers by themselves or through terminal companies other than Jay Street Terminal, receive and transport to the New Jersey rail terminals traffic originating in New York City, including the traffic of competitors of the Federal Company; and it appears that the compensation paid alike to the Jay Street Terminal and to such other terminal companies is no more than is just and reasonable for the services so rendered and the use of the instrumentalities so furnished.

It follows that the charge of undue preference is based solely upon the fact that a part of the traffic handled through Jay Street Terminal is shipped by Arbuckle Brothers, whose members compose the terminal company. The title to over 85 per cent of these Arbuckle Brothers' shipments passes to the consignees on delivery to the railroad company at the Jay Street Terminal, and title to the remainder, for which railroad order bills of lading are forthwith issued, may or may not remain in Arbuckle Brothers while they are being hauled by the Terminal Company.

Unless the mere fact that the carriers have so employed Jay Street Terminal for no more than a just and reasonable compensation, constitutes an undue preference to Arbuckle Brothers and subjects the Federal Company to undue or unreasonable disadvantage, they are not subjected to any. It is true that with respect to their shipments via these appellees lightered from Yonkers, they are at a natural disadvantage, as it costs them 3 cents per hundred pounds for lighterage to the New Jersey terminals or to any point in New York City where the carriers have stations or receive freight, except that in case of shipments *delivered* at Pier 24, the cost is 4 cents; but these appellees are not responsible for this disadvantage, and no one except the

learned Solicitor General contends that they should be required to bear the burden or expense of bringing such shipments from Yonkers to the carriers' terminals, although the order complained of would erroneously, by indirection, accomplish that result.

The Federal Company points out no alleged prejudice beyond the fact of the employment above stated. On the contrary, its counsel deliberately stated to the Commission that his client would be in no respect benefitted if the operation of that terminal were to pass into the hands of a third party or were to be taken over by the railroad companies themselves (Record, 61, 65). This would seem to conclusively show that neither the employment of Jay Street Terminal nor the relations of Arbuckle Brothers to the traffic handled through the terminal subjects the Federal Company to any undue or unreasonable prejudice or disadvantage.

In its final analysis the real fact is that the only disadvantage the Federal Company is under so far as its relation to these carriers is concerned, arises from its location at Yonkers, and it has been for years, and is now, endeavoring to overcome that disadvantage by inducing or compelling the railroad companies to perform lighterage service to Yonkers or assume at least the cost thereof.

The allowance provided in the order is not the proper or legal measure of relief which could be awarded even if a case of violation of section 3 had been established.

In a case arising under sec. 3, the Commission cannot by its order go further than to equalize the undue advantage and thereby relieve the undue prejudice.

We are unable to perceive that there is any undue disadvantage for the removal of which a money allowance is proper or lawful, but it would seem in any event that on no tenable theory could any such allowance properly exceed such part of 3 cents per hundred pounds as fairly represents what it pays the Ben Franklin Company for

performing lighterage service across the river between Pier 24 and the New Jersey stations. In no sense is the just and reasonable compensation paid to Jay Street Terminal and other terminal companies for much greater, more costly and more valuable service a proper or legal measure of what would equalize any advantage which the appellants contend the carriers have given to Arbuckle Brothers.

The Jay Street Terminal and the other terminal companies furnish, severally, terminals and other instrumentalities used in transportation worth millions of dollars, as against the wandering lighter of the Ben Franklin Company, representing an investment of a few thousand dollars.

The present order requires as one alternative the payment to the Federal Company of allowances that would much more than pay the entire cost of transporting their traffic from Yonkers to the New York or New Jersey terminals of the carriers and give them an unjust advantage over New York shippers. The Commission has no power to require or even to permit any such practice or allowance.

III.

The Commission's decision is based on its erroneous conception of the grounds on which, under the statute, an advantage may be pronounced undue, and on its mistaken view that, because of possible incidental advantages, the employment of the owner of property transported to render a service connected with such transportation, and to furnish instrumentalities to be used therein, for no more than a just and reasonable compensation for such services and the use of such instrumentalities, creates undue preferences and unjust discrimination.

Upon this mistaken view of the law it "is inclined to think," in the present case (Record, 53, 55) that the em-

ployment of Jay Street Terminal to perform such transportation services is sufficient to deprive them of their character as transportation services, and make them purley accessorial services, so far as they relate to property shipped by the owners of such terminal. In other words, that the fact that the owner is employed to render services which otherwise would be transportation services may deprive them of their character as transportation services, and that the Commission may prohibit the payment of even a just and reasonable compensation therefor, on the ground that the services cannot be considered transportation services, and that therefore any payment therefor is an unlawful allowance.

This view would, to a large extent, nullify the provision of sec. 15, expressly authorizing and recognizing the right to employ owners of shipments to perform such services, which was adopted at the instance of the Commission.

In its report to Congress in 1905 it presented the subject as follows:

> "There is an important class of cases in which the owner of the property performs a part of the transportation service, where the carrier by paying such owner an extravagant sum for the service rendered thereby, prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of excessive mileage upon the private car which conveys the property of the owner of the car.
>
> "Our investigations leave no room for doubt that all these methods are, at the present time, more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in

the transportation of property which is furnished by the owner of the property. *We hesitate to recommend at this time so drastic a measure as that.* Assuming that such a law would be a constitutional exercise of authority it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously, both to shipper and railway, and without injury to the public, if provided by the shipper himself. We do think, however, the Commission should be empowered in a case of this kind to determine whether the allowance to the property owner is a just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate and any remedy is extremely difficult of application but nothing better appears to be available."

Congress thereupon amended sec. 15 in accordance with this recommendation.

Subsequently the Commission changed its view, and after a process of evolution adopted the erroneous conception above indicated, as shown by its decisions in, among other cases, this case and the "Grain Elevation" cases, in which latter cases this court held:

> "The law does not attempt to equalize fortune, opportunities or abilities. On the contrary the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in sec. 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion").

Interstate Commerce Com. vs. *Peavey*, 222 *U. S.* 44.

It would seem from the position taken by the Commission in this case, and by its comments on the decision of this court in the Peavey and Diffenbaugh cases in

its recent annual Report to Congress that it still retains an erroneous conception of the purpose and effect of this provision of section 15, as the same has been declared by this Court.

In that report to Congress the Commission, after quoting from the opinion of the Court, says:

> "As we understand this language, the court holds that the Commission is powerless to forbid a carrier from paying this allowance, although it does result in a preference to the one receiving it, for the reason that Congress has approved, by the terms of the statute, this course of proceeding. In other words, the Supreme Court holds that a statute which was enacted for the express purpose of forbidding discrimination n favor of the owner of an elevator has permitted and perpetuated a possible discrimination in that very particular.
>
> "The court declares that 'the law does not attempt to equalize fortune, opportunities, or abilities.' We had never supposed it to be the intention of the act to regulate commerce to equalize fortune or ability, but we had supposed that a cardinal purpose of that act was to equalize opportunity, in so far as that opportunity was afforded, as here, by a railroad subject to the act, and we desire to call attention to the practical consequences of this decision."

The decision of this Court rests upon the broad ground that, as a matter of law, the carrier has the right to employ the owner of property to perform services connected with "transportation" as defined in the act, and that the Commission has no power to prohibit payment of a reasonable and just compensation therefor. It would seem to be controlling in the present case.

IV.

The decree of the Commerce Court should be affirmed.

GEO. F. BROWNELL,
H. A. TAYLOR,
Solicitors for Railroad Companies, Appellees.

20

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

UNITED STATES, THE INTERSTATE COMMERCE COMMISSION and THE FEDERAL SUGAR REFINING COMPANY,

Appellants,

against

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE BROOKLYN EASTERN DISTRICT TERMINAL AND OTHERS,

Appellees.

No. 722.

BRIEF FOR BROOKLYN EASTERN DISTRICT TERMINAL.

H. B. CLOSSON,
Of Counsel for Brooklyn Eastern District Terminal, Appellee.

C. G. Burgoyne, 72 to 78 Spring Street, New York.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, and THE FEDERAL SUGAR REFINING COMPANY, Appellants,	
AGAINST	No. 722.
THE BALTIMORE AND OHIO RAILROAD COMPANY, THE BROOKLYN EASTERN DISTRICT TERMINAL, and others, Appellees.	

BRIEF FOR BROOKLYN EASTERN DISTRICT TERMINAL.

Statement.

The Brooklyn Eastern District Terminal is a transportation corporation organized under the laws of the State of New York. It was not a party of record, though a party in interest, to the proceeding before the Interstate Commerce Commission. In the suit before the Commerce Court to set aside the order of the Commission it was upon its petition duly presented (Rec., 89–104) allowed to intervene as a party Complainant (Rec., 121),

under the provisions of Section 5 of the Act creating the Court that :—

> " Any party or parties in interest to the proceeding before the Commission in which an order or requirement is made may appear as parties thereto * * * in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party. * * * *Provided further* that communities, associations, corporations, firms and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the terms of this Act * * * relating to action of the Interstate Commerce Commission may intervene in said suit or proceedings at any time after the institution thereof," &c.

The Report of the Commission upon which was made the order the operation of which has been temporarily suspended by the Court below referred to the Brooklyn Eastern District Terminal in the following language (Rec., 60) :

> " The complainant [the Federal Sugar Refining Company] also charges that a similar allowance paid to the owners of the so-called Brooklyn Eastern District Terminal, owned by Havemeyer interests, also subjects it to undue prejudice and disadvantage. It is at this dock that the output of the American Sugar Refining Company is largely handled. But although our understanding had been to the contrary, we were told at the hearing that the Havemeyers owned only an insignificant amount of the capital stock of that Company. Accepting these statements at their face value, we need not at this time consider that phase of the complaint."

In the Commerce Court it was made to appear without contradiction that, although the main terminal of the Brooklyn Eastern District Terminal (hereafter referred to as the B. E. D. Terminal) is situated within a block of the large Brooklyn Refinery of the American Sugar Refining Company, and naturally, therefore, handles most of its traffic, there is now no community of interest or ownership whatever between the two Companies. Each is absolutely independent of the

other. The American Sugar Refining Company has no interest whatever in the B. E. D. Terminal, all of whose stock is owned by five members of the Havemeyer family. None of them have any interest in or connection with the American Sugar Refining Company (Rec., 91).

The B. E. D. Terminal for many years has maintained and operates in Brooklyn, New York, on the East River, between North Third and North Tenth Streets, an extensive railroad terminal; which has been designated in the tariffs of the complainants' railroads herein, except the Pennsylvania Railroad, and is used by it and three other railroads, and eighteen steamship lines, engaged in the transportation of freight to and from New York Harbor, as a receiving and delivery station for their freight.

It has trackage facilities, where cars can be handled to and from floats and contents forwarded or delivered from track, in full carloads; and a covered pier where package freight is handled directly between the cars and pier. The terminal is equipped with all modern appliances for the convenient and prompt handling of freight of all kinds. The yards for the delivery of track freight have paved roadways without grade, and a capacity for several hundred cars. There is also a yard for the accommodation of livestock, grain elevators of 500,000 bushels capacity, a hay warehouse in which hay can be inspected, sold or stored; one crane of twenty tons capacity, and 2 cranes of 10 tons capacity each, and other special facilities for the handling of heavy freight, such as machinery, structural material, &c. (Rec., 92).

The present value of the plant and equipment of this terminal alone is substantially as follows (Rec., 92):

Real Estate	$5,288,360.00
Building and Construction	435,869.53
4 Tugs	137,146.70
13 Floats	258,987.98
13 Lighters	79,377.72
9 Locomotives	49,659.66
Franchises	14,000.00
	$6,263,401.59

Upon this investment of $6,263,401.59 the net earnings during the year 1910 were $321,555.12, or 5.13 per cent., all derived from payments made to it by the Railroads under their published tariffs of the terminal charge of $4\frac{1}{5}$ cents or 3 cents for each 100 pounds of freight transported between the terminal and the termini of such railroads in New York Harbor; $4\frac{1}{5}$ cents per 100 pounds on all freight moving to or from the western termini of the trunk lines and points beyond, and 3 cents per 100 pounds on all other freight (Rec., 92).

During the year 1910 the total freight transported by the Company to or from the Brooklyn terminal and smaller terminal stations likewise maintained by it at Pidgeon Street in Long Island City and at Warren Street in Jersey City, was 2,796,263,006 pounds. Of this total, 868,022,125 pounds—to wit, 31.04 per cent.—was sugar, and 1,928,240,811 pounds—to wit, 68.96 per cent.—was miscellaneous merchandise. Of this total tonnage, 53.74 per cent. was eastbound and 46.26 per cent. westbound. It was received from or delivered to not less than 1,650 separate customers (Rec., 93).

The maintenance and operation of the terminal is a commercial necessity for the large and busy districts of Brooklyn and Jersey City which it serves, and is rendered possible only by the fact that as a union terminal for substantially all the railroads and steamship lines in the Harbor, it is able to amalgamate their eastbound and westbound business, so that it handles each way approximately the same amount of traffic, and is thus enabled to earn the very moderate return of 5.13 per cent. upon its investment. No such result could be accomplished by any terminal handling the traffic of one railroad or steamship line alone (Rec., 93).

The transportation business of the B. E. D. Terminal is secured to it not alone by its ability to perform the service, but, in the case of most of the trunk lines, by contracts between it and them having yet several years to run, substantially in the form of that with the Erie Railroad, a copy of which is in the Record (pp. 98–103). By said contract the Terminal agrees to maintain its terminal and the necessary floats, tugs, docks, float bridges and approaches; at all times to receive, transfer and deliver freights loaded or to be loaded in cars sufficient to accommodate the amount of business; to be unqualifiedly responsible for the safety of all cars and

freight while in its possession ; to provide a competent person to superintend the traffic of the railroad, and to issue bills of lading for it upon its account for west-bound freights ; to pay to the Railroad all freight moneys and charges for the transportation of east-bound freights, and all freight moneys and charges payable in advance on west-bound freights, and to keep insured all freights, cars or property received by it under the contract. The Railroad agrees that within the limits of the former City of Williamsburg, extending from Wallabout Bay, on the south, to Newtown Creek, on the north, the Railroad, unless legally compelled to do so, will not establish or maintain any freight stations, nor receive on water craft, for transportation over its lines any freights, except as provided for in the said contract ; and that it will not deliver on water craft at any points within such limits, unless legally compelled to do so, any freight transported eastwardly over its railroad in any other manner than as provided for in such contract.

In compensation for this service the Railroad agrees to pay the Terminal the $4\frac{1}{5}$ cents per 100 lbs. on all freight to or from beyond the western termini (except coal and coke and grain in bulk), and 3 cents per 100 lbs. on the rest (Rec. 102).

Compensation at these rates of 3 and $4\frac{1}{5}$ cents per 100 lbs. is a reasonable and necessary one for the service performed by these terminals. They are in effect union receiving and delivery yards, located at convenient points along the water front of New York Harbor of the railroads. They afford a means whereby the freight shipped from or consigned to the district served by the terminal can be assembled at and delivered from a point conveniently near its origin or destination, and there loaded into or unloaded from the through cars in which its continuous carriage has been or is to be performed without breaking bulk. If such terminal stations were not maintained by the Terminal Companies from the compensation paid to them by the railroads for the services performed by them, they would need to be maintained at the direct expense of the railroads themselves, and less economically than now ; since it is only as union terminals, serving all the different railroads and steamship lines entering the harbor, that they can be made to earn a reasonable profit upon the capital necessarily invested in them. Each such terminal

involves the devotion to its use of large areas of expensive real estate and the maintenance of the extensive equipment heretofore described, including locomotives, and tugs, and floats, each capable of receiving from the tracks from twelve to twenty loaded freight cars, transporting them across the harbor, and thence delivering them upon the tracks of the terminal or of the railroads by which they are to be moved to destination (Rec., 96).

On the other hand, lighterage service alone such as is performed by or for the Federal Sugar Refining Company as distinguished from a terminal and car floatage service, is performed by small lighters, representing each an investment of not more than $7,000, a fleet of from two to four of which can be towed by a tug hired for the purpose at an expense of $7.50 per hour. For such simple lighterage service when not performed in connection with the maintenance of a terminal a compensation of 3 cents per 100 pounds is adequate; is the prevailing rate in New York Harbor; and is the actual cost to the Federal Sugar Refining Company of the service now performed by it in lightering its sugar from its refinery at Yonkers to the termini of the railroads. The Federal Company handles only its own product and maintains no terminal station, tracks, floats, lighters, tugs or other real estate or equipment of a terminal station (Rec., 95-97).

Nevertheless, under the terms of the order of the Commission, unless the Railroads should take the alternative of violating their contract with the Jay Street Terminal and crippling, if not destroying, it by depriving it of the revenue which now maintains it, the Federal Sugar Refining Company must hereafter be paid by the Railroads on all its sugar bound for points beyond the western termini 4⅛ cents per 100 pounds; although the Federal Company would lighter it at an expense to itself of only 3 cents per 100 pounds. The Federal Company would accordingly under the order of the Commission receive from the Railroad an allowance of 1⅛ cents per 100 pounds in excess of the cost of the service.

It is apparent, therefore, that the order of the Commission in its attempt to remedy a supposed unjust discrimination against the Federal Sugar Refining Company, which, if it exists, is due to nothing but that Company's deliberate location of its factory outside the lighterage limits, would merely

create a more palpable and serious unjust discrimination in favor of the Federal Sugar Refining Company as against all the other sugar refining companies actually within the lighterage limits of New York Harbor; if the effect of the order were confined to what it in terms enjoins.

Of course, it cannot be. On this point it suffices to quote from the report of the Commission itself the passage quoted in the Commission's brief here at page 41:

> "If the defendants accord Arbuckle Brothers the privilege of lightering their sugar from their dock and make them an allowance therefor, we regard it as axiomatic under the principles of this legislation that they must accord a like privilege and make a like allowance to the complainant from Pier 24, the complainant being a competitor in the same line of business and reaching the same markets of consumption."

If this be true, it is equally axiomatic that if the Railroads accord the Federal Sugar Refining Company the privilege of lightering their sugar from their dock and make them an allowance therefor, they must accord a like privilege and make a like allowance both to the American Sugar Refining Company and the National Sugar Refining Company. The traffic of both these Companies is now handled by the Brooklyn Eastern District Terminal; the revenue from it is essential to its existence; and it is assured to it by its contracts with the Railroads (Rec., 101).

Any such diversion of traffic from either of the now established terminal stations of the Railroads as would necessarily follow from the enforcement of the order of the Commission would disorganize the whole system under which the immense traffic of New York Harbor is now conveniently handled, and inflict serious loss on all the parties concerned in it.

(*a*) It would involve two unnecessary handlings of the merchandise so transported, and an impossible congestion of traffic at the termini of the different railroads; thus subjecting all such traffic to needless expense and intolerable delay.

(*b*) It would involve to the Terminal so serious a loss of revenue—sugar is 31 per cent. of the Brooklyn Terminal's traffic, and 44 per cent. of the Jay Street Terminal's (Rec., 81,

93)—that it would no longer be possible for either to earn a reasonable return upon the investment involved in it, or continue its service.

(*c*) It would involve serious loss and inconvenience to the numerous neighboring shippers and consignees who now use such Terminals for the receipt and delivery of their freight and thereby save themselves long and expensive cartage. They have not and cannot get the water front facilities which are monopolized by a few large industries. They would be unable, therefore, to avail themselves of the privilege of lightering their own freight at a profit of one and one-fifth cents per 100 lbs., which the order of the Commission, if enforced, would secure to the few water front industries alone at the expense of all other shippers now served by the Terminals.

These inconveniences and losses which the enforcement of the order of the Commission would entail upon the Railroads, upon the Terminal Companies and upon general shippers and consignees of freight about New York Harbor, are, of course, not adverted to as arguments against the legality of the order. They do serve to make clear the interest of all these parties in a careful inquiry into the legality of the order and in a reversal of it if illegal. That it is illegal is asserted by the petition of the Brooklyn Eastern District Terminal in the Court below, and is respectfully submitted here, for the following reasons:

POINTS.

1. The maintenance by the Railroads of public receiving and delivery stations to which cars may be transported on their own wheels, such as the Brooklyn Eastern District Terminal, located at points on Long Island convenient to the origin and destination of the freight to be carried, and the payment of the compensation necessary to procure the maintenance of such stations and the transportation of such cars to and from them, is a lawful and necessary service performed by the railroads. The Interstate Commerce Commission has not the power to

require the railroads, as a condition of being permitted to maintain and operate such terminals, to pay lighterage allowances to individual shippers who elect instead to deliver their own freight to the railroad termini in New Jersey and on Staten Island. By the order in question the Commission has assumed to exercise such power.

2. The maintenance of such public terminals for handling cars on their own wheels is not a like service to lightering the freight of individual shippers from their private docks to the railroad termini; and the railroads may pay to such terminals the expense of the public service, and refuse to pay to such shippers the expense of the private service, without thereby being guilty of any discrimination. The order in question of the Commission is based upon the proposition that the railroads in so doing are guilty of unjust discrimination.

3. The railroads may under the law maintain public receiving and delivery stations, such as the Brooklyn Eastern District Terminal, at convenient points, without thereby incurring any obligation to pay shippers, located at points remote from such stations, the expense of the cartage or lighterage of their merchandise from their factories to any of such stations or to another station. The order of the Commission imposes upon the railroads such obligation, as a condition of being allowed to maintain such public stations.

4. The railroads, having established through routes and joint rates to their several stations on Long Island, that of the B. E. D. Terminal among the number, cannot be required under the law to pay to individual shippers on Long Island who elect to deliver their freight instead at an intermediate point in such through route, the cost to such shippers of such delivery to such intermediate point. Under the order of the Commission the railroads will be required to make such payments.

5. The just and reasonable charge and allowance, according to the findings of the Commission itself, for the sole service of lightering sugar, when the expense of maintaining a public terminal station is not involved in the service, from the refineries in New York Harbor, and from the Federal Sugar Refining Company in Yonkers, to the railroad termini in New Jersey and on Staten Island, and the actual cost to the refineries of such lightering, is three cents per 100 pounds. The order of the Commission requires the railroads to pay to such refineries on all sugars so lightered bound for points beyond the western termini, 4⅕ cents per 100 pounds, to wit, 1⅕ cents per 100 pounds in excess of a just and reasonable allowance. The Commission has no such power.

If arguments or authorities are necessary to the support of the foregoing propositions, both will be found at length in the briefs of the other appellees. It would be mere prolixity to repeat them here.

6. The Commerce Court is not asked by the Bill or the intervening petitions to set aside any finding of fact made by the Interstate Commerce Commission, but to determine whether upon the undisputed facts the Commission had the power to make the order it did. If the Commerce Court shall upon final hearing determine that the Commission had no such power, it will have jurisdiction to set the order aside. As upon the *prima facie* showing made by the Bill and petitions, not in any way controverted upon the hearing before it, it was of the opinion that unless they should be controverted upon the final hearing such would be the order which it ought eventually to make, it properly exercised the discretion expressly given it by the statute in such case, to suspend pending such final hearing the operation of the order of the Commission.

The one contention of the appellants in this regard is that though all the facts upon which it acts are undisputed, the finding of the Commission that an undue preference exists is in every case a finding of fact which no Court can review, and which therefore ends the controversy.

This is certainly not the law. The *Peavey* Case (*Interstate Commerce Commission vs. Diffenbaugh*, 222 U. S., 42), deter-

mined by this Court in November last, so holds. In that case the report of the Commission contained the express finding that the advantages given to Peavey & Co. constituted "*an undue and unlawful preference*" (14 I. C. C. Repts., 315, 316). Nevertheless this Court affirmed the decree of the Circuit Court granting an injunction against the enforcement of the order of the Commission.

The order of the Commerce Court should be affirmed.

H. B. CLOSSON,
Of Counsel for Brooklyn Eastern District
Terminal, Appellee.

IN THE

Supreme Court of the United States.

THE UNITED STATES, THE FEDERAL SUGAR REFINING COMPANY and INTERSTATE COMMERCE COMMISSION,
Appellants,

against

BALTIMORE AND OHIO RAILROAD COMPANY and others, and JAY STREET TERMINAL and ARBUCKLE BROTHERS,
Appellees.

No. 722.

REPLY OF JAY STREET TERMINAL AND ARBUCKLE BROTHERS, INTERVENORS TO BRIEF FOR THE UNITED STATES.

DYKMAN, OELAND & KUHN,
Solicitors for Intervenors,
177 Montague Street,
Borough of Brooklyn,
New York City.

WILLIAM N. DYKMAN,
Of Counsel.

IN THE

Supreme Court of the United States.

No. 722.—October Term, 1911.

THE UNITED STATES, ET AL.,
Appellants,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees.

REPLY OF JAY STREET TERMINAL AND ARBUCKLE BROTHERS, APPELLEES.

It was the great misfortune of Jay Street Terminal and Arbuckle Brothers not to be made parties to the proceeding before the Interstate Commerce Commission. They fully believe their proofs of the history and situation of the terminal in Brooklyn and its services would have compelled a decision in their favor. At least the situation would have been understood, and they would be free from the aspersion and innuendo of business immorality and unfair trading.

They learned, for the first time, of the second proceeding after the order of the Commission was published, in March, 1911, and but a few days before it was to become effective, in April. They learned, at the same time, that the railroad companies were instituting an action in the Commerce Court to challenge the validity of the order. The statute creating the Commerce Court made that the tribunal to hear their plea, and they intervened.

Unless they are to be held to have been finally condemned without being heard and convicted of offenses against the statute without their day in court to show their innocence, the facts stated in their petition and affidavit must be taken to be true. Happily, many of the main facts pleaded by them will be found upon search to be stated in the Reports of the Commission or to be necessary inferences from facts found.

Arbuckle Brothers in 1898 built a refinery and entered into competition with American Sugar Refinery, the colossus of the trade. They found the American Company in receipt of allowances of 3 and 4½ cents for lighterage of its sugar from its refinery and demanded and received the like privilege, *i. e.* to lighter their sugar from the refinery to the railroads in New Jersey. The second report states (p. 49): "*It is also our understanding that when Arbuckle Brothers began to compete with the Havemeyer refineries these allowances were extended to them, apparently under some sort of verbal arrangement.*" It hardly lies in the mouth of counsel defending an order of the Commission which professes to equalize Arbuckle Brothers and Federal Company to argue that the extension to Arbuckle Brothers was an offense against the statute. The competition of Arbuckle Brothers with the American Company continues to this day. The American Company ceased to lighter its sugar and delivered it to Brooklyn Eastern District Terminal, and thereby procured quicker transportation, and saved two handlings of its bags and barrels, with consequent improvement in condition of deliveries. The Jay Street Terminal was established in 1905. A real estate was purchased and improved expressly for its purposes which is now assessed for taxation at upwards of $1,700,000. With the equipment the investment exceeds $2,000,000.

The other greater terminals in Brooklyn, viz, Brooklyn Eastern District Terminal, The New York Dock Company (operating three terminals) and Bush Terminal

Company, were in receipt of 3 and $4\frac{1}{5}$ cents per cwt., and identical rates were given to Jay Street Terminal for identical service. The learned Solicitor General with the suspicion generated of imperfect knowledge calls the different prices "the ears of the rebate," which "the parties forgot to tuck in . . . when they put over it the sham cover of transportation service." The "simple truth" is that the Jay Street Terminal received the current market rate in New York Harbor paid to all other terminal companies which manufacture nothing and are wholly separated from production. The "simple truth" further is that Jay Street Terminal received less than the cost of the service. Yet the Solicitor General writes of rebates, calls Jay Street Terminal a "mouth," and Arbuckle Brothers a "maw," and concludes that the Terminal "feeds" and Arbuckle Brothers "grow fat." These are gross misrepresentations in the face of the findings of the Commission. The "simple truth" is that Arbuckle Brothers would starve on the Terminal receipts. It does not return simple interest and the financial benefit of it is yet to come from an increase in general merchandise handled.

The Solicitor General is troubled by "things of sham and shadow." He reads in the Jay Street Terminal contract with the Erie Railroad Company that the railroad will not establish a competing terminal between Catherine Ferry and the U. S. Navy Yard, (which means seven or eight blocks), from February 15, 1906, until March 31, 1910, or thereafter, without ninety days notice. (R. p. 19). He assumes the false premise that the railroads could acquire a Brooklin water front by eminent domain, and charges them with "a base abdication of powers and abjuration of duty."

The contracts with the Baltimore & Ohio, the New Jersey Central, the Ontario & Western and the Pennsylvania have always been terminable at any time. The contracts with the Erie & Lehigh may now be terminated at

any time by ninety days' notice. The only time contract is with the Delaware, Lackawanna & Western, and it expires in 1915. (R. p. 107).

The Solicitor General writes, (Brief, p. 13): "Thus the two concerns, the Arbuckles and the Havemeyers, appropriated to themselve so much of the Brooklyn water front," and (p. 14) "the conditions have been deliberately created to repel any competition in the sugar business."

A little knowledge of the Brooklyn shore would have shown the Solicitor General that between Catharine Ferry and the Navy Yard four blocks are occupied by Jay Street Terminal and Arbuckle Brothers, one by Brooklyn Union Gas Company, one by the Edison Electric Light Company, and part of one by Atlantic White Lead Company. A competing refinery there is physically impossible, as is a competing terminal. Again, at and near the terminals of Bush Terminal Company, New York Dock Company and Brooklyn Eastern District Terminal are lands suited to refineries, and obtainable. The cry that refineries have been excluded and competition hindered by this contract is not "the simple truth," but is one of the Solicitor's "things of sham and shadow."

The Solicitor General condemns the clause in the contract which provides that whenever the 3 cents and $4\frac{1}{5}$ cents per cwt. is increased or reduced to "Palmer's Dock," which was the predecessor of Brooklyn Eastern District Terminal, it shall be increased or reduced to Jay Street Terminal and all other Brooklyn terminals. (Brief, p. 13). None of the other Brooklyn terminals produce a pound of freight, nor ship a pound. The intent was to give Jay Street just what was given to other terminals which could not offer a pound of freight to the railroads. This is submitted to refute the argument that their control of traffic enabled Arbuckle Brothers to dictate contracts to the railroads.

The learned Solicitor General writes of the service of the Brooklyn Eastern District Terminal to the American

Company, and of that of Jay Street Terminal to Arbuckle Brothers, and that of Ben Franklin Company to Federal Company (p. 7). "The lighterage service in the three cases is the same, so far as concerns the railroad companies," and again (p. 10) "It is the prime purpose of the law to secure this equal treatment for competitors in business where conditions are similar. And a railroad may not by its mere *ipse dixit* create dissimilarity where it would not otherwise exist. It cannot adopt the Arbuckle Brothers plant as one of its public terminals and refuse to adopt for the same purpose the plant of a competitor when the result is to create marked discrimination. The allowance here is from fifteen to twenty-one dollars per carload of fifty thousand pounds, according to destination—enough to confer an insuperable advantage in the trade."

Is this "simple truth" or "sham and shadow." To simplify the argument, let it be admitted that lighterage by the Ben Franklin Company from Pier 24 across the North River is the exact equivalent of car floatage three times as far, *i. e.*, assume that the service afloat by all three costs the same. There remains the service on shore by the Brooklyn terminals. The Eastern District has real estate, buildings and locomotives valued at nearly six million dollars. The real estate of the Jay Street Terminal is assessed for taxation at over $1,700,000. These properties ashore, and all the shore service of switching loaded and empty cars, loading and unloading cars, billing and otherwise handling freight the Solicitor General wholly ignores. The Federal Company has no terminal plant, and has never offered to provide one. The conditions are wholly dissimilar, and cannot be made similar by the *ipse dixit* of the Solicitor General. He further ignores the fact that the cost of the Jay Street Terminal service exceeds the compensation, and argues a financial advantage to Arbuckle Brothers equal to the

gross compensation, which he calls an "insuperable advantage."

I agree that "It is the prime purpose of the law to secure this equal treatment for competitors in business where conditions are similar," and submit that the Solicitor General seeks to violate this purpose when he attempts to secure for Federal Company for a lighterage across the North River 3 cents and $4\frac{1}{5}$ cents per cwt., being far more than the cost of it, more, indeed, than the cost of lighterage from Yonkers to Pier 24 and then across the river, because that price is paid Jay Street Terminal for exclusive use of a great terminal station and terminal services and for car floatage, thence to New Jersey terminals.

Under sec. 15 the Federal Company railroads cannot pay more than a just and reasonable compensation for a service of transportation and the Commission before it orders such a payment must adjudge that the service is part of railroad transportation and that the payment is just and reasonable. The Commission orders this payment to Federal Company on the ground that it is paid Jay Street Terminal ignoring as the Solicitor General ignores the financial loss to Jay Street Terminal and the profit which would follow to the Federal Company. This is beyond the power of the Commission.

II

The arrangement between Arbuckle Brothers and the railroad companies is, not as the Solicitor General argues, a traffic arrangement rather than an operating one.

The Solicitor General writes that the contracts "were dictated by the sugar men, and secured through their control of the traffic" (p. 19). The proof of this he finds in the testimony of a Pennsylvania official in another case concerning Mr. Havemeyer and the American Company. Mr. Arbuckle has never had any relations with Mr. Havemeyer save of keen and constant competition.

If the innuendo is intended to charge joint action it is refuted by the Reports, and is false in fact. The Solicitor General further writes (p. 23) "as Arbuckle Brothers are the agents of all the companies, there must necessarily be some understanding as to the allotment of business to the different companies, as only so could one agent serve so many masters." No allegation to this effect has ever before been made nor any evidence on the subject offered and no fact found by the Commission but only the conclusion of the Solicitor General. The affidavit of Mr. Jamison which is ignored shows that eighty-five per cent. of Arbuckle sugar is sold before shipment to purchasers who pay the freight and control the route (R., p. 79).

The contract shows that the compensation of 3 and $4\frac{1}{5}$ cents per cwt. is the same to all Brooklyn terminals, to the Bush Terminal Company and New York Dock Company which ship no sugar nor any merchandise owned by either, and to the Eastern District Terminal wholly separated from the American Company and the Jay Street Terminal, controlled by the partners in Arbuckle Brothers.

The learned Solicitor General concludes (p. 24): "Here are unified tactics as to traffic, comprehending every railroad serving the territory and insuring to Arbuckle Brothers advantages in the sugar business against which, without similar advantages, no rival could successfully contend for the western trade."

I affirm to the contrary that the Federal Company has a store door delivery of 85 per cent of its sugar to the New York Central, and lighters only 15 per cent (R., p. 20). As to this 85 per cent the Federal Company has the advantage for Arbuckle has to carry his sugar in horse drawn trucks to Jay Street Terminal and then the Terminal handles its business at less than cost. This advantage to the Federal Company arises from the location of its refinery at Yonkers between the water front where it receives its raw material and the railroad by which it ships its refined product. Can Arbuckle Brothers ask

the Commission to find some offset to this advantage or the Federal Company an offset to a Brooklyn location.

Counsel for the Federal Company, during the first case, conceded that if the railroads acquired Jay Street Terminal his client would not be helped. (R., p. 65). It having been established by the evidence in the first case that the Eastern District Terminal is wholly independent of the American Company, the counsel for the Federal Company virtually waived all question concerning them, (R., p. 31), and in the second petition wholly failed to mention either.

There can be no financial advantage to Arbuckle Brothers and no financial disadvantage to Federal Company, unless Jay Street Terminal is overpaid, and of this there is no allegation nor any proof, and the finding and concession of the Commission is to the contrary. The matter is well summed up by the Chairman of the Commission in the first case. (R., p. 32).

> "The contract in question is of no practical consequence to complainant, and its situation would not be improved in any substantial or noticeable degree if that contract were cancelled and the Jay Street Terminal operated by defendants (the railroads). So far as concerns complainant there is no practicable difference in the relations of defendants (the railroads) with Arbuckle Brothers as shippers of sugar and the American Sugar Refining Company as a shipper of the same commodity, although in one case the common ownership of refinery and terminal is complete, while in the other case such common ownership is a negligible quantity. This, of course, is upon the assumption that we are correctly informed by the evidence as to the financial results of the operation of the Jay Street Terminal under the Arbuckle contract. If the facts are otherwise, as complainant has had full opportunity to ascertain and as might be found upon more complete and accurate disclosure, we would presumably be led to a different conclusion."

The Solicitor for Interstate Commerce Commission, in his brief, writes as follows (p. 49):

> "The reasonableness *per se* of the allowance paid by the carriers to Arbuckle and Jamison has not been passed upon by the Commission, nor does that question affect in any way the discrimination between Arbuckle and Jamison on the one hand and the Federal Sugar Refining Company on the other."

Counsel for the Federal Company in the second case did not accept the offer of the Commission to investigate the financial results, and in his brief in this court Mr. Bigelow writes (p. 13):

> "These facts and inferences are brought here to the attention of the court not at all with the idea of showing that the allowance made to Arbuckle & Jamison is unreasonable within section 15; counsel has consistently refused to develop that side of the evidence, resting his case on the contention that, as transportation by the carriers begins on the rail terminals on the New Jersey shore, *any* allowance to Arbuckle, whether more or less than their lighterage cost, is rebate, and a discrimination against the Federal Company."

These are as direct admissions as could be expected that the compensation to Jay Street Terminal is less than the cost of the service it renders and the instrumentalities it furnishes. This was found in the first case (p. 28) and conceded in the second Report (p. 51.)

The Jay Street Terminal contract is not therefore a financial advantage to Arbuckle Brothers and the Solicitor General falls into error in assuming that it is a financial disadvantage to the Federal Company and a hindrance in its competition "for the western trade."

III

The contract does not offend public policy or the commodities clause of the statute or the clause against disclosures.

The Solicitor General writes, (Brief, p. 14,): "Arbuckle Brothers stand as the initial carrier from Brooklyn to the West, getting part of the through rate on all shipments." And, again, (p. 17): "If, under cover of rendering a service connected with transportation, a shipper can turn himself into a carrier or carrier's agent and conduct the entire business of transportation, then the preceding paragraph of section 15 forbidding disclosure as to shipments made, save with the consent of the shipper or consignee, and the commodities clause also, are completely nullified."

Here is certainly a full admission that the Jay Street Terminal renders a service and furnishes an instrumentality of transportation. The imputed vice is that it does so much as to offend against the statute.

It might suffice to answer that if the learned Solicitor General is correct in his interpretation the order of the Commission is void because it perpetuates the illegal contract or allows it to continue. There is a better answer.

This court has held that the "commodities clause" of the statute does not cover commodities sold by the carrier before shipment.

U. S. vs. D. & H. Co. 213 U. S. 366.

Only 15 per cent of Arbuckle sugar could be within the rule invoked and the 85 per cent sold before shipment cannot be affected. The order covers all sugars shipped from Jay Street. If the argument prevails the only lawful order would be one forbidding Jay Street Terminal to handle sugars consigned to Arbuckle Brothers or owned by them. The Solicitor General argues that the contract offends against the clause of the law which forbids the disclosure by a carrier of a shipper's business, writing that no sugar refiner can use Jay Street Terminal. None does. There is no refinery, save Arbuckle Brothers, within trucking distance of Jay Street Terminal. The only other refineries in Brooklyn are

those of the American Sugar Refining Company which are adjacent to the Brooklyn Eastern District Terminal. The waterfront tributary to the Jay Street Terminal extends from the Navy Yard to Catharine Ferry and the whole front is occupied and no refinery could there be established. Just to the north of the Navy Yard is the Wallabout station of the Railroad and still further to the north is the Brooklyn Eastern District Terminal; while south of the Fulton Ferry are the Fulton, the Baltic, and the Atlantic Terminals of the New York Dock Company; and the Bush Docks. (See Map attached to brief for Railroad companies, appellees.)

If the Railroad Companies had asked the Federal Company to use the Jay Street Terminal there might be point in the objection, but it would be ridiculous to suggest that a Yonkers refinery should lighter its sugar to Brooklyn when the Jersey rail terminals intervene and on the Manhattan shore a dozen terminals of the railroads from which they offer lighterage to the Federal sugar.

The Peavey & Company elevator case is ignored by Mr. Solicitor. Peavey & Company elevated grain out of Union Pacific cars and loaded it into eastbound cars. Such elevation is expressly made transportation by terms of the statute. Peavey & Company were just as truly carriers or carrier's agents as ever was Jay Street Terminal and just as truly conducted "the entire business of transportation" from Union Pacific car to another east bound. The consignors and consignees and the volume of traffic of each, would be known to Peavey & Company if any competitor shipped through their elevators. The fact is stated in the Reports of the Commission that no shippers used Peavey elevators and so the fact is here, and until some sugar refiner applies to use the Jay Street Terminal the Peavey & Company case is a complete answer to the argument of Mr. Solicitor. The argument is that the contract should be construed against the evident purpose of the parties signing it, to make the delivery of Arbuckle sugar occur

at the Jersey terminals and not at Jay Street. The contract would then certainly be unlawful for it would provide for payment by the carrier to the shipper for an accessorial service. This is argued at length in my brief.

It is conceded that Jay Street Terminal performs a public service of great importance to Brooklyn. The Solicitor General in his brief writes, as follows (p. 11):

> "In the bill filed by the Railroad Companies it is said (p. 6), 'that Jay Street Terminal serves the shippers of a large and important manufacturing and shipping territory including about one-third of the densely populated part of Brooklyn.' We accept this statement as true. There is much more in the record as to the commanding position of this terminal."

If the order of Interstate Commerce Commission becomes effective the Federal Sugar Refining Company will lighter a great portion of its 5,000 barrels per diem, and will be paid large profits and have great advantages over Arbuckle Brothers, or else Jay Street Terminal will be crippled. Correspondingly, The American Sugar Refining Company, with a capacity of over 30,000 barrels per diem will lighter its sugar and be paid correspondingly large profits and have correspondingly great advantages and Brooklyn Eastern District Terminal, which serves substantially all manufacturers and shippers of the Williamsburgh district of Brooklyn will be crippled and these serious results are ordered by the Interstate Commerce Commission to prevent Jay Street Terminal performing a service of public importance at less than cost.

If the arguments of the appellants prevail, justice would be done to all by ascertainment of the cost of lighterage to the Federal Company from Pier 24 to the rail terminals of the carriers in New Jersey and by an order directing the payment of compensation not to exceed that cost. This would seem to be an idle ceremony because the carriers are now offering the Federal Company the full equivalent

in free lighterage from any station on the Manhattan shore or from Pier 24 or any other pier within the lighterage limits.

If there is a discrimination in the situation against the Federal Company, the wrong will not be cured by creating a greater one against Arbuckle Brothers and in favor of the American Company and Federal Company by directing the payment of allowances out of the freight rates to the Federal Company, which must certainly result in the like allowances to the American Company.

William N. Dykman,
For Jay Street Terminal and
Arbuckle Brothers.

Supreme Court of the United States

BROOKLYN EAGLE PRESS.

To be argued by
WILLIAM N. DYKMAN
for JAY STREET TERMINAL
and ARBUCKLE BROS.

Supreme Court of the United States

THE UNITED STATES, THE INTER-STATE COMMERCE COMMISSION, and THE FEDERAL SUGAR REFINING COMPANY, Appellants, against BALTIMORE & OHIO RAILROAD COMPANY and others, THE JAY STREET TERMINAL, ARBUCKLE BROTHERS and others, Appellees.	722 Brief for Jay Street Terminal and Arbuckle Brothers.

Statement of Facts.

The United States appeals from an order of the Commerce Court granting an injunction suspending an order of the Interstate Commerce Commission which forbids the railroads to pay allowances to Arbuckle Brothers while refusing to pay like allowances to Federal Sugar Refining Company (p. 132). The order was made on May 22d, 1911

(p. 125). On the same day an order was made denying motions by the United States and the intervening defendants to dismiss the petitions of the railroad companies and intervening plaintiffs (p. 124). The Interstate Commerce Commission and the Federal Sugar Refining Company appeal from "the decree or order * * * rendered on the 22d day of May, 1911" (p. 127), without specifying whether it is the order granting the injunction or the order refusing to dismiss. In their assignment of errors, however, they specify both (p. 128).

This cause has been twice tried and decided by the Interstate Commerce Commission.

> Fed. Sugar R. Co. of Yonkers vs. B. & O. R. Co., et al., 17 I. C. C., 40.
>
> Fed. Sugar R. Co. v. B. & O., et al., 20 I. C. C., 200.

The Federal Sugar Refining Company of Yonkers was the complainant in the first case. It was located at Yonkers, in Westchester County, had its refinery and offices there, and lightered its sugar from there to the railroad terminals of the defendants. The complaint was that the contract of the railroad companies with the Jay Street Terminal, a partnership composed of John Arbuckle and William A. Jamison, under which the union freight station was maintained and operated on the Brooklyn shore, was a discrimination on the part of the railroads against the Yonkers Company and in favor of Arbuckle Brothers, refiners of sugar, composed of the same partners and who shipped their product through the Jay Street Terminal,

The decision of the Commission was that no discrimination was practiced against the Yonkers firm by the establishment of the terminal in Brooklyn. The Yonkers refiners were determined to be discriminated against. They changed their corporate name by omitting "of Yonkers" and changed their residence to New York and slightly changed their method of lightering their product from Yonkers to the railroad terminal in New Jersey and came again before the Commission and this time were successful, the Commission holding that the railroads discriminated against the Yonkers refiners and in favor of the Brooklyn firm.

Each decision was made by a divided Commission. The minority in the first decision was changed to a majority in the second by the vote of Commissioner Clark. The identical relief which was denied in the first case was granted in the second. The one change in the facts we shall show to be immaterial. Both reports of the Commission are in the record in this Court in full (pp. 24 and 44). They are, we submit, opposite conclusions upon essentially the same facts calling plainly for the relief granted by the Commerce Court.

This proceeding was instituted by the appellee railroad companies by petition to the Commerce Court (Record, p. 2) to annul the order of the Interstate Commerce Commission (Record, p. 67) in the second case requiring the railroad companies "to cease, and desist on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain, from paying such allowances to Arbuckle Brothers on their sugar (i. e., on sugar loaded

into cars and carried on floats from the Brooklyn freight station of the railroads to their terminals on the Jersey shore) while at the same time paying no such allowances to said complainant on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be duly discriminatory and in violation of the Act to regulate commerce." (Record, p. 38.)

I shall argue in this brief that the Commission exceeded its powers,

1. In forbidding the railroads to perform contracts made by them with Jay Street Terminal.

2. In directing payments to Federal Sugar Refining Company for an accessorial lighterage service.

3. In finding that the contract with Jay Street Terminal for terminal service in Brooklyn and performance of it is a discrimination against a refinery in Yonkers and shipment of its sugar from Manhattan.

John Arbuckle and William A. Jamison are the co-partners in two firms. They were not nor were either of their firms "Jay Street Terminal" nor "Arbuckle Brothers," parties to either proceeding before the Commission. They intervened in the Commerce Court (p. 105). Of them the complaint of the Federal Company to the Commission in the second case states among other things, as follows (p. 39):

> "V. That John Arbuckle and William A. Jamison are co-partners engaged in the business of manufacturing and dealing in sugar under the firm

name of 'Arbuckle Brothers,' and having a principal place of business at No. 71 Water Street, Borough of Manhattan, City of New York."

"VI. That the said John Arbuckle and William A. Jamison, as co-partners, conduct a terminal and lighterage business under the name of 'Jay Street Terminal,' owning, maintaining, and operating in connection therewith an extensive water front and docks adjacent to their refinery at the foot of Jay Street, Borough of Brooklyn, together with tugboats, car floats, and the usual appurtenances for receiving, handling, and transporting freight by water."

"VII. That the product of the sugar refinery operated by the said John Arbuckle and William A. Jamison under the name of 'Arbuckle Brothers' is lightered or floated in their own equipment from their dock at the foot of Jay Street, aforesaid, by the said Arbuckle and Jamison, operating under the name of 'Jay Street Terminal,' and delivered to the defendants at the rail terminals aforesaid for transportation at the New York rate."

The Commission confused the two firms, which physically and under the law are wholly separate, and confused also "allowances" to shippers out of freight rates with contract prices for services and instrumentalities used in the course of transportation.

The complainant owns and operates a sugar refinery in Yonkers with a capacity of 5000 barrels of sugar per day. It lighters 750 barrels per day to the appellee railroads (p. 20). It has a "store door" delivery to the New York Central railroad (p. 26). The Commission was led to believe

that complainant was a relatively small shipper. Compared with American Sugar Refining Company this is true, but American Company and Federal Company stand alike except that American Company is hard by the Brooklyn Eastern District Terminal and moves its sugar to the railroad in trucks and Federal Company has a store door delivery to the New York Central of eighty-five per cent. of its sugar and is twelve miles or more away from the appellee railroads, who carry fifteen per cent. and finds it advantageous to lighter this part of its sugar. The complainant is one of the great shippers of west bound freight and no carrier would willingly discriminate against it.

Arbuckle Brothers refinery is within a short hauling distance of Jay Street Terminal and hence all this litigation. Arbuckle Brothers capacity and output is believed to be a little greater than the Federal Company, but Jay Street Terminal is the agent of all the railroads and none may be preferred. Arbuckle Brothers connection with it therefore negates preference. The Federal Company is, however, free to send its lighters with 750 barrels a day to any favored railroad, and the idea that any carrier discriminates against it may be dismissed.

What has happened is that the carriers and several hundred Brooklyn shippers needed a great union freight station and the carriers secured it by contract with Jay Street Terminal. If the Court looks beyond that entity to the partners who compose it and to the fact that another partnership with the same members ships sugar through the terminal the question will arise of limitations upon the Terminal and whether privileges accrue to competing shippers.

The railroad companies in and by their tariffs filed with the Interstate Commerce Commission and duly published have named Jay Street Terminal, Brooklyn, as a freight terminal and fixed the rates from and to this station. (Report, p. 50). They have for six or seven years received and delivered freight at this station. They state in their petition that they have held themselves out as common carriers to and from this Terminal (p. 4). Of the necessity of these extensions of their routes to Brooklyn, Commr. Lane dissenting in the first case wrote, as follows (Record, p. 34):

> "The railroads ending at the Jersey shore are under necessity to provide themselves with terminal facilities in New York City and Brooklyn. Not only it is to their advantage to do so, but it is to the public interest also. The shippers of New York City and Brooklyn would, in many cases, be compelled to remove their places of business to other points if the transportation facilities afforded them by the lighterage extension of the rail lines were withdrawn."

The dissenting minority in the first case became the controlling majority in the second case. In the second case Commr. Harlan wrote (p. 55): "So far as the general shipping public is concerned, the Arbuckle dock may doubtless now be regarded as a public receiving station of the defendants," and again (p. 51): that "sugar moves westward from New York City in larger volume probably than any other commodity; indeed, we were recently advised in another connection by the well informed general

counsel of one of these defendants that sugar constitutes almost one-third of all the traffic moving westward from that point of origin." The intervening petition of the Brooklyn Eastern District Terminal which maintains in Brooklyn an extensive railroad terminal, shows (Record, p. 93) that 432,000 tons of sugar and over 964,000 tons of miscellaneous merchandise moved to and from the Eastern District Terminal during the year 1910. The intervening petition of Jay Street Terminal shows that the total tonnage handled at the Jay Street Terminal for the year 1910 was 613,305 tons, of which sugars shipped westbound by Arbuckle Brothers was 44 per cent. and general merchandise was 56 per cent. (Record, p. 81). There are other and more important terminals in Brooklyn whose operation do not appear in the record, but there is sufficient to justify the statement of Commr. Lane that these extensions of the rail lines to Brooklyn are commercial necessities.

The Commission finds that the "Arbuckle" terminal is operated under contract with the carriers (p. 45).

The Jay Street Terminal contract with the Erie Company is set forth in full in the Record (p. 15). The contract recites that the Terminal is the owner of land along the East River upon which are erected and in process of erection warehouses, bulkheads, docks, piers, railway tracks and sidings, equipped or about to be equipped with suitable float bridges and approaches and the usual appurtenances for receiving, handling and delivering freight and for transporting it between the Terminal and the freight station of

the Railroad at Jersey City. It further recites that the Terminal is engaged and will continue in the business of receiving freights and carrying the same "in both directions between its said premises and the said station of the railroad company and other carriers." It further recites that the railroad company desires to avail itself of the facilities, conveniences and services of the Terminal Company in the transportation of freights in both directions. The Terminal covenants to maintain its premises in good order and condition for the reception and delivery of freights, to provide tugboats, carfloats, docks, piers, floatbridges and approaches adequate at all times to receive, discharge, transfer and deliver freights to be loaded in cars under the contract. The Terminal further covenants to receive in Jersey City at the floatbridge of the Railroad Company in cars to be placed upon its floats all freights intended for delivery in Brooklyn and to carry the same to Brooklyn and deliver them to the consignees. It covenants also to receive and load into cars all freights delivered to it in Brooklyn for transportation over the Erie Railroad and to carry it upon floats of the Terminal to Jersey City and deliver it to the Railroad at the floatbridges of the Railroad Company. The Terminal further covenants to provide a competent person to superintend the business and to carry out the rules of the Railroad Company as to loading cars. The Railroad Company agrees to pay the Terminal Company "in full for all its services under this contract as well as in full compensation for all responsibility to be undertaken in respect of cars and freights as follows":

(a) For all east bound freights originating from its connecting lines west of trunk lines western termini on through rates or for freight received by the Terminal Company or west bound destined for transportation to points west of said western termini on through rates four and one-fifth cents per hundred pounds.

(b) For freight originating at or destined to any of the said western termini or points east thereof three cents per one hundred pounds.

The railroad company agrees that during the continuance of the contract the rates to and from Jay Street Terminal should be the same as those prevailing to and from the regular stations of the railroad Company in the Borough of Manhattan, City of New York. The Terminal agrees to insure against loss by fire and marine risks all freights, cars and property received by it upon its floats or premises under the contract, such insurance to be for the benefit of the Railroad Company or the consignees as their interests shall appear and further agrees to be responsible to the Railroad Company for the cars and the freights in transportation to and from Brooklyn and Jersey City. The report of the Commission in the second case is to the same effect save that it confuses the two firms, Jay Street Terminal and Arbuckle Brothers. It states as follows (p. 45):

"Arbuckle Brothers * * * owns an extensive property at the foot of Bridge Street in the city of Brooklyn, having a frontage of 1200 feet on the East River and locally known among the shippers

that use it as the Jay Street Terminal of the defendants.

"Under a contract with the defendant carriers Arbuckle Brothers operate the property as a freight station for the defendants. For that use of the dock and for their services in conducting it as a freight station and in floating and lightering shipments between the dock and the regular terminals of the defendants in Jersey City, Arbuckle Brothers receive from the defendants allowances ranging from three to four and one-fifth cents per hundred pounds on all merchandise passing through the Terminal whether inbound or outbound. * * * * They receive similar allowances on merchandise of other shippers handled through the Jay Street Terminal in the same manner. It may be well here to add that the defendants assert that the Jay Street dock was made a railroad terminal in order to provide a freight station for the shipments of manufacturers and merchants in Brooklyn who have no dock of their own. And it is true that a substantial tonnage, said to be about two-thirds of the total tonnage now passing through the terminal is of that character."

The proportions stated in the report were true of the year 1907. The affidavit of Mr. Jamison shows (p. 81) that in 1910 the total tonnage through Jay Street Terminal was 613,305 tons of which Arbuckle Bros. shipped 269,854 tons of sugar or forty-four percent. Of this sugar eighty-five percent (p. 80, fol. 148) is consigned to purchasers on "straight" or "order" bills of lading and title passes from Arbuckle Bros. to the consignee at the moment when Jay Street Terminal receives it for and in the name

of the railroad. It results that Jay Street Terminal in 1910 carried only 40,478 tons of sugar belonging to Arbuckle Bros.

Mr. Jamison's affidavit (p. 79) not contradicting the report of the Commission but giving important details is in part, as follows:

> "West-bound freight is handled by the Jay Street Terminal as follows:
>
> "The terminal furnishes to the shippers who are doing business with it, blank bills of lading of the so-called standard form approved by the Interstate Commerce Commission, June 27, 1908, and consisting of (1) a straight (or order) bill of lading, which is sent to the consignee, (2) a memorandum copy therof, acknowledging that an original bill of lading has been issued, which is held by the shipper, and (3) a shipping order, which is retained by the carrier. These bills of lading are stamped with the name Jay Street Terminal to show that the freight originated in Brooklyn and at the Jay Street Terminal. The bills are there and then signed by Mr. Frederick Tillier, as agent of the railroad company. The bills are signed under the contract with the Railroad Company."
>
> "A transaction in sugar, including the sale by Arbuckle Brothers, delivery to the Jay Street Terminal and the shipment from the Railroad Company may be described, as follows:
>
> "A broker in sugar or any buyer signs and delivers to Arbuckle Bros., at their office in the Borough of Manhattan, written order for a given number of barrels of sugar signed by the purchaser or his broker which contains the name of the purchaser, his address, and the character of the route

over which the sugar is to be shipped, via all rail, lake-and-rail, ocean-and-rail, etc. On the face of this and in red letters is the following inscription: 'Delivery complete on receipt of goods by carrier.' From the office of Arbuckle Bros., in Manhattan to the refinery in Brooklyn, a shipping slip is sent, which gives the name of the consignee, the shipment route, and the description of the sugar, the price, and the freight rate. It also contains the freight rate which the consignee agrees to pay."

"The sugar is delivered by Arbuckle Bros., from their refinery to the Jay Street Terminal in trucks. The sugar is loaded from the trucks into the railroad cars. Arbuckle Bros., as shipper, fill out and sign, as shipper, a blank bill of lading, which has been delivered to said Arbuckle Brothers, as shipper, by the Jay Street Terminal, and deliver said bill of lading to Jay Street Terminal along with the sugar to be shipped. The Terminal signs the bills of lading in the name of the railroad as herein above described and delivers the original and the memorandum acknowledgement to the consignor."

"The bill of lading covering the sugar when it is delivered to Arbuckle Bros., contains the name of the purchaser as the consignee, and this is true of eighty-five per centum of the shipments of sugar. About fifteen percent of sugar shipped by Arbuckle Bros., is shipped to Arbuckle Bros., as consignee at different points in the United States. The bills of lading received by Arbuckle Bros., are the same day, and never later than the next day, sent by mail to the consignee with an invoice. The result of these transactions as they are understood between the buyers of sugar and Arbuckle Bros., is that the title to all sugar sold by Arbuckle Bros.,

changes to the buyer when the bill of lading is signed at the Jay Street Terminal."

There was evidence before the Commission of the financial result of the operations of the Jay Street Terminal. Upon the first proceeding the report of the Commission states as follows (p. 32):

> "Upon the present record it is not shown that any profit accrues to the Jay Street Terminal under the payments now made, as stated above, of 3 and 4 1-5 cents per 100 pounds. Indeed, the only inference which can be drawn from the proof submitted is that the Jay Street Terminal does not receive a reasonable return upon the investment. If this be the truth of the matter, as must be assumed on the evidence now before us, we are unable to perceive that the existing relationship between the defendants and this terminal company is illegal or results in any violation of the act. The fifteenth section as amended clearly implies that a just and reasonable allowance may be made to the owner of property transported, when such owner renders a service connected with or furnishes an instrumentality used in the transportation. This provision, for aught we can see, applies to the Arbuckle concern, and nothing has been made to appear which indicates that the allowance to that concern exceeds the authorized measure of compensation."

Upon the second proceeding the report of the Commission stated, as follows (p. 51):

> "It is also urged that the investment of Arbuckle Brothers in their dock property approximates $1,200,000 and that the net earnings from its opera-

tion in 1907 as a terminal for the defendants amounted to but $35,566.84, this being only slightly in excess of 3 per cent on the investment, nothing being allowed for interest and depreciation. Net earnings, as everyone knows, vary with the character and extent of the items embraced on the expense side of the account. But the accuracy of these figures may be admitted without bringing us any nearer to a solution of the problem presented to us by the complainant. The fact will still remain that Arbuckle Brothers as shippers of sugar over the lines of the defendants, enjoy a substantial advantage over its competitor, a shipper of sugar over the same lines to the same destinations. As owners of a dock property that is doubtless growing rapidly in value, their arrangement with the defendants enables them to hold and carry it at a substantial net profit and at the same time reimburses them for the cost of delivering their sugar to the defendants on the west shore of the river for carriage to interstate destinations."

It is submitted as matter of law that three per cent. on an investment spells loss and not profit. Moreover, the contract rates have twice been before the Commission, which has power under section fifteen to reduce them. They remain unchallenged and therefore are to be conclusively presumed just and reasonable.

There have been two complaints by the owner of the Yonkers refinery to the Interstate Commerce Commission. The reports and orders in both are in the record in full. "The Federal Sugar Refining Company *of Yonkers*," the then owner of the Yonkers refinery, made its complaint in May,

1907 (Exhibit "B," p. 20). The report of the Commission in that case was written by the Chairman, Mr. Knapp. A dissenting opinion was written by Commissioner Lane. It complained that the American Sugar Refining Company, through the Brooklyn Eastern District Terminal, and Arbuckle Brothers, through Jay Street Terminal, received allowances with whom concurred Commissioners Clements and Harlan. The deciding vote was cast by Commissioner Clark. Concerning the Jay Street Terminal, Commissioner Knapp wrote as follows (p. 27, 28):

> "The Jay Street Terminal and the Brooklyn Eastern District Terminal, in Brooklyn, are in the nature of union terminals and are designated as regular terminals of defendants in all their lighterage tariffs except those of the Pennsylvania Railroad Company, which has its own freight station adjoining the Brooklyn Eastern District Terminal and handles freight through that terminal only to a limited extent. The two terminals mentioned are owned by independent concerns with which defendants have contracts, substantially alike, which in fact make them the terminals of defendants for all purposes of receiving and delivering general freight from and to large shipping districts in Brooklyn. Defendants pay these terminals for their service 4 1-5 cents per 100 pounds on all shipments handled through the terminals originating at or destined to points west of defendants' western termini, and 3 cents per 100 pounds upon shipments originating at or destined to said western termini or points east thereof. The two terminal companies, under these contracts, lighter or float eastbound freight from defendants' rail terminals

to their respective terminals in Brooklyn and deliver it to consignees. They receive westbound freight from shippers and lighter or float it to the west bank of the Hudson. They assume full responsibility for all eastbound freight upon receiving it from the railroads, and for all westbound freight until delivered to the railroads, and agree to indemnify the roads for all money paid out by them for loss of or damage to such freight while in the possession of the terminal companies. The terminal companies have authority to issue bills of lading of the railroads for westbound freight and are responsible for all claims, injury, or damages arising from their improper issuance. They are responsible for and pay to the railroads all freight charges on eastbound freight handled through their terminals and all freight charges payable in advance on westbound freight. The situation to-day is practically the same as it was, and had been for years, when complainant began operations at Yonkers."

Commissioner Lane dissenting, agreed that the Terminals in Brooklyn were union freight stations and were necessary, but that the railroads must not discriminate (p. 34).

All the Commissioners therefore agreed that Jay Street Terminal is a Brooklyn railroad terminus. Commissioner Clark based his concurrence with the majority of his brethren upon the ground that the lighterage limits of the Railroad Companies could not by any order of the Commission be extended to include Yonkers. He further wrote (p. 33):

"In my opinion if the complainant were located

> within the lighterage limits the defendants could not lawfully permit complainants competitors to lighter their sugar and receive pay for that service and refuse to permit complainant to lighter its sugar and receive the same compensation for that service."

The order dismissing the complaint of the "Federal Sugar Refining Company of Yonkers" was made on June 24, 1909. The complaint of the "Federal Sugar Refining Company" was filed September 29, 1909. It is to be noticed that the new company is not in its title at least "of Yonkers." In the body of its complaint it is alleged that the new complainant "is located within the free lighterage limits established by the defendants." No complaint is made in the second petition agaist the American Sugar Refining Company nor the Brooklyn Eastern District Terminal. The owners of the Yonkers refinery changed their corporate name and made a slight change in their method of lightering their sugar from Yonkers to the Railroad Terminal. This may be best told in the words of Commissioner Harlan, writing the report of the Commission upon the second application (p. 47):

> "Under the arrangement in effect at the time its first petition was before us the sugar was lightered by the Ben Franklin Transportation Company, directly from the complainant's dock at Yonkers to the defendants' freight depots on the Jersey shore. But since our report in that proceeding was announced the method of handling the traffic has been changed, and the arrangement upon which this complaint is based was agreed upon and carried into effect by the two companies.

"A lighter reports every morning at the dock of the complainant at Yonkers and receives such sugar in barrels, boxes, or other packages as may be ready for shipment. The superintendent of the refinery, having been previously advised from the company's general offices in New York City of the quantity of sugar required in order to fill accepted contracts, has the sugar ready at the stringpiece and it is loaded into the lighter by employees of the transportation company. The officer in charge of the lighter gives a receipt for the shipment and in return is handed a document showing the complainant as the consignor at Yonkers and the consignee at 138 Front Street. It also gives the contract numbers, together with the weight and description of the packages. The lighter then proceeds with its load to Pier 24, which, as heretofore stated, is within the lighterage limits. It is there made fast to the dock and notice of its arrival is given at the general offices of the complainant. Thereupon the complainant issues shipping instructions to the transportation company and hands to its representatives a bill or bills of lading for execution by the defendant carriers upon the delivery of the sugar on the Jersey shore. Upon receiving these instructions and the bills of lading the lighter proceeds to the freight depots on the Jersey side and there makes delivery of its cargo by unloading the sugar upon the car platforms of the carrier or carriers named in the lading papers. The bills of lading are executed by the carriers and returned to the lighterman."

"For its services in taking the sugar first to Pier 24, and then, after receiving instructions and the bills of lading, in carrying it across the river and

making delivery at the rail ends of the defendant carriers, the Ben Franklin Transportation Company, under its contract with the complainant, demands and receives 3 cents per 100 pounds.

The order of the Commission therefore is based upon the finding that the lighterage of the Federal sugar begins at Pier 24, North River, which is almost directly across the North River from the New Jersey terminals. The order is that the railroad companies shall break their contract with Jay Street Terminal, which is not declared unlawful but may continue if the railroads pay the Federal Company for ferrying across the North River the entire cost of lightering the sugar twelve miles from Yonkers to Pier 24 and then across the River to the New Jersey terminals and in addition a clear profit of one and one-fifth cents per 100 pounds on all sugar shipped beyond the western termini of the railroad companies. The Commission states that it intends to place the Federal Company "on exactly equal terms" with Arbuckle Brothers. The Commission writes (p. 59):

> "Under every principle of equality embodied in this legislation the defendants must deal with the two shippers on exactly equal terms. They must themselves lighter the sugar to their regular freight stations across the river with their own equipment, or must accord to each shipper the privilege of doing the lightering in his own way; and if under Section 15, or under any other provision of the act, they pay an allowance to one of the two shippers, on the theory that he has furnished a facility and performed a part of the transportation service for the

defendants, they must make a like allowance to the other shipper who has done precisely the same thing."

The Commission has not decided that three cents and four and one-fifth cents is a just and reasonable compensation to the Federal Sugar Company nor that it is more than the cost of the service rendered by Jay Street Terminal, but has decided as matter of law that the same compensation must be paid to Jay Street Terminal and Federal Company for dissimilar and unequal services.

POINT I.

This Court reviews the findings of the Interstate Commerce Commission upon appeal from an order granting an injunction suspending the order of the Commission.

I. C. C. vs. D., L. & W. R. Co., 216 U. S., 531.
I. C. C. vs. No. Pac. R. Co., 216 U. S., 538.

The statute expressly authorizes the Commerce Court to grant such an injunction and authorizes also the appeal to this Court from the order granting the injunction.

Two injunction orders are authorized. The one of them is "a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission *for not more than sixty days* from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said

order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage."

No such limited order has been made in this case. The injunction order that was granted was "upon notice and after hearing" (p. 125). There was no need, therefore, of a finding in the order of irreparable damage.

Neither Jay Street Terminal nor Arbuckle Brothers were parties before the Interstate Commerce Commission. They never had their day in court until they intervened in the Commerce Court. The statute creating the Commerce Court provides that, parties situated as these were "may intervene in said suit or proceedings at any time after the institution thereof, and the attorney general shall not dispose of or discontinue said suit or proceedings over the objection of said party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the attorney general of the United States therein."

These parties are situated as were owners of grain elevators in a case lately decided by this Court. In the Court below it was contended that the complainants were not parties before the Commission and their right to challenge its order by a bill in equity was disputed.

> Peavey Co. vs. U. P. R. Co., 176 Fed. Rep., 409.

In that case Judge Sanborn wrote:

"These parties have no remedy at law. Are they deprived of the right to equitable relief because those opposed to them did not cause them to be made parties to the proceeding or to be notified of the hearing before the Commission upon which this order is founded? If so, parties may easily deprive those injuriously affected by such orders of all relief by making, as in this case, those having a like interest parties to the proceeding and excluding those who are interested in opposition to their interest. In such a case none of the parties to the proceeding may successfully maintain a suit to challenge the order, because none of their interests are irreparably or at all injured, and, if those whose interests are injuriously affected, may not assail it, the order is impregnable."

"This cannot be the true rule of right or of practice. A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the Commission to those who were parties to the proceeding before it upon which the order was based. The proceeding in the court is not an appeal; it is a plenary suit in equity. 'The jurisdiction to hear and determine such suits' is vested in the Circuit Courts. Section 16, as amended (U. S. Comp. St. Supp., 1909, p. 1162). The determination of the question what parties may maintain such suits is left by the interstate commerce act to the general rules and practice in equity, and under them any party whose rights of property are in danger of irreparable injury from an unauthorized order of the Commission may appeal to a federal court of equity for relief."

See also:

M., K. & T. Ry. Co., I. C. C., 164 Fed.,645, 649.
Kentucky Bridge Co. vs. L. & N. Ry. Co., 37 Fed. Rep., 567.

Against parties who were not before the Commission and have never been heard its findings of fact should not be conclusive. They should be heard to establish the facts they allege and their petition should be accepted as tone.

On an appeal from an order granting an injunction *pendente lite* the appellant must show that no cause of action is stated in the bill.

Hudson R. T. Co. vs. W. T. & R. R. Co., 121 N. Y., 397.

POINT II.

The order of the Commission cannot be upheld, upon the ground that the questions are of fact not reviewable in the Courts.

In the Court below, counsel for the United States argued that the question whether a discrimination is undue and forbidden is a question of fact and he cited cases in this Court. That is not the question here.

Underlying the question whether a discrimination is undue, is the question whether any discrimination exists and, in the case at Bar, this is submitted to be a question of law.

The Statute provides (Sec. 15) that:

> "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any

> instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable."

The contract permitted by this section is not a discrimination forbidden by Section 2, nor can the Commission hold it unlawful, under Section 3.

No Commission, nor any Court, can treat that as a public or private wrong which the Congress has authorized.

> Hammersmith, etc., R. Co. vs. Brand, 4 H. L. Cas. (Eng. & I. R. App.), 171.
> Bellinger vs. N. Y. C. R. Co., 23 N. Y., 42.

The Commission answers this argument, as follows (p. 57):

> "That contention cannot be admitted as sound. On the contrary, we hold that when a carrier undertakes to have such a terminal operated for it by the owner of the property and the owner happens also to be a large shipper over its line, the law reads into the agreement between the carrier and the owner the peremptory requirement that the arrangement shall not result in any undue and unjust discrimination against other shippers competing with the owner in the same line of business. The prohibition of inequalities among shippers is perhaps more fundamental and vital than any other feature of the act."

Here are certainly questions of law, namely: whether the permission of Section 15 is subordinate to the prohibitions of Sections 2 and 3 and whether the law reads anything into the agreement between the carriers and the

Jay Street Terminal and, if so, what is the composite contract.

This composite contract with the Jay Street Terminal, made in 1906 must, according to the Commission, recognize the right of "Federal Sugar Refining Company of Yonkers" to change its corporate clothes and residence and stop its lighter at Pier 24 and thus become entitled to receive all that the carrier can give a shipper under Section 15. But that section provides that "the charge and allowance therefor shall be no more than is just and reasonable."

The question of law arises, whether the Commission without inquiry as to whether such allowance is just or reasonable, can compel the carriers to pay the Federal Company for lighterage across the river 3 cents and 4 1-5 cents because that is the contract price with the Jay Street Terminal although the Commission finds, concerning the Federal Company and its lighterman (p. 48), that "for its services in taking the sugar first to Pier 24 and then, after receiving instructions and the bills of lading, in carrying it across the river and making delivery at the rail ends of the defendant carriers, the Ben Franklin Transportation Company, under its contract with the complainant, demands and receives 3 cents per 100 pounds." Just such a question was held by this Court to be a question of law.

Southern R. Co. vs. St. Louis, &c., Hay Co., 214 U. S. 297.

Another question discussed in the report is whether the railroad transportation of sugar refined by Arbuckle Brothers begins at the Jay Street Terminal when the carriers bill of lading issues, or on the Jersey shore when the car float is made fast to the dock. The attempt of the Commission here was to separate the service rendered by Jay

Street Terminal into two parts and to compare "floatage" from Brooklyn with lighterage from Pier 24.

Here are a number of questions of law and the finding of the Commission, it is submitted, proceeds upon mistaken views of the law. The order confuses the sugars which Arbuckle Brothers sell with a stipulation that the delivery of it is complete on the receipt of goods by the carrier and upon which the purchaser pays the freight and for which the carrier has issued his bill of lading with other sugars consigned by Arbuckle Brothers to Arbuckle Brothers and which Arbuckle Brothers continue to own. The question of law is presented, whether under the contract, the responsibility of the carrier does not begin upon the sugar which Arbuckle Brothers owns when their bill of lading issues, in spite of the indemnity given under the contract by the Terminal to the carrier. Other questions of law are presented which are argued under separate heads in this brief.

POINT III.

Federal sugar being the cargo of a steam lighter plying between Yonkers and New York, is not brought within the offer of free lighterage made by the tariffs of the railroads by making the lighter fast to Pier 24, North River.

The whole case of the complainant rests upon the affirmative of this proposition. The first decision of the Commission is not reversed, but stands in full force and effect. The stop of the lighter at Pier 24 is held in second case to change the legal relation of the parties.

The railroads are under no legal duty to furnish free

lighterage or to extend thus or otherwise their rail lines. Their rail terminals are at Jersey City and they can refuse to receive freight at other terminals. They can establish one terminal in Manhattan and one in Brooklyn, and we shall show hereafter that the Brooklyn terminal can be secured by contract with a shipper. They can make a further limited offer to accept merchandise at the string piece of certain piers for carriage in lighters owned by them or operated for them. This latter they have done and that is all there is of the free lighterage limits. They have never offered to pay shippers to lighter merchandise and no shipper has the legal right to demand it.

The Report of the Commission and the intervening petitions show that the offer made in and by the railroad tariffs to all shippers and receivers, is to receive and deliver merchandise from consignors and to consignees at any pier within certain limits stated in the railroad petition. That petition states (p. 4):

> "Your petitioners transport, between said terminal stations, piers, docks, and landings and their rail terminals on the western shore of New York Harbor, as a part of the transportation service from the points of shipment to the point of destination, and for the flat New York rate, by means of lighters, floats, and barges, owned and directly operated by them or operated for them under contracts between them and the owners of such equipment, freight received at or destined to said terminal stations, piers, docks, and landings."

The Federal Sugar Company has the same right as any and every other shipper under this tariff and that is and

is only, to tender to the railroad its merchandise from a pier *to a lighter owned or operated by or for the railroad.* No such tender has ever been made nor attempt to comply with the free lighterage rule. The facts are thus stated by the Commission, in its report, (p. 47):

> "A lighter reports every morning at the dock of the complainant at Yonkers and receives such sugar in barrels, boxes, or other packages as may be ready for shipment. The superintendent of the refinery, having been previously advised from the company's general offices in New York City of the quantity of sugar required in order to fill accepted contracts, has the sugar ready at the stringpiece and it is loaded into the lighter by employees of the transportation company. The officer in charge of the lighter gives a receipt for the shipment and in return is handed a document showing the complainant as the consignor at Yonkers and the consignee at 138 Front Street. It also gives the contract numbers, together with the weight and description of the packages. The lighter then proceeds with its load to Pier 24, which, as heretofore stated, is within the lighterage limits. It is there made fast to the dock and notice of its arrival is given at the general offices of the complainant. Thereupon the complainant issues shipping instructions to the transportation company and hands to its representative a bill or bills of lading for execution by the defendant carriers upon the delivery of the sugar on the Jersey shore. Upon receiving these instructions and the bills of lading the lighter proceeds to the freight depots on the Jersey side and there makes delivery of its cargo by unloading the sugar upon the car platforms of the

carrier or carriers named in the lading papers. The bills of lading are executed by the carriers and returned to the lighterman."

To this, Commr. Prouty dissenting, wrote (p. 66):

> "The transaction, in fact, is precisely the same now that it was formerly, except that the steamer now stops at Pier 24. Great stress is laid in the opinion upon the fact that the 'Ben Franklin' is actually made fast to the wharf, but to my own mind it would subserve exactly the same purpose if she were to whistle in midstream when passing that pier. It is impossible for me to understand how any performance of this character can change the actual relation of these parties when the thing accomplished is in both cases identical."

The report of the Commission shows how just is the criticism made in the dissenting opinion. The report states (p. 56):

> "Indeed, we see little ground, upon the facts now before us, for denying the privilege and the allowances to the complainant from the point where its sugar crosses the lighterage limits established by the defendants. That, however, is a question that need not be discussed, for we have found that the complainant now lighters its sugar from Pier 24, which is within the lighterage limits."

The northerly lighterage limit on the North River is 135th Street and if, therefore, the Yonkers lighter, on her way down stream from Yonkers, should stop opposite 135th Street and blow her whistle to attract the man from

shore with the papers, and having them go on to the New Jersey rail terminals, the Commission is of opinion that allowances should then and there begin. Later in the Report Commissioner Harlan writes (p. 58):

> "It is the sugar that the complainant is offering for shipment, and it is offered from a point that is within the lighterage limits. It may have been manufactured in the Philippines, or brought in from Porto Rico, or imported from Germany. This particular sugar happens to have been refined at Yonkers. But wherever it may have been made, the relevant fact from a transportation point of view is that at a given moment a quantity of sugar is at Pier 24 ready for shipment to interstate destinations on the lines of these defendants. It matters not how it got there, whether by lighter or by cart or by wheelbarrow; it is ready for shipment at that point."

Here the error of the Commission comes to the surface and is in plain sight. The Federal sugar in the hold of the steam lighter coming down stream from Yonkers and crossing the free lighterage limit line at 135th Street, or tied up to Pier 24 is, the Commission decides, within the railroad tariff for a free lighterage equally with the sugar "manufactured in the Philippines, or brought in from Porto Rico, or imported from Germany" and in the hold of the ocean going steamship. A cargo of beet sugar coming in from Germany on a Hamburg liner and crossing the line of the free lighterage limits at 69th Street, South Brooklyn, is, within the rule announced by the Commission, within the free lighterage limit. We assert, on the

contrary, as a matter of law, that the Federal Sugar is not "at Pier 24 ready for shipment to interstate destination on the lines of these defendants" until the Federal lighter from Yonkers unloads its cargo and the sugar is ready for loading upon the railroad lighter, and the plain and sufficient reason is that the railroad companies have included sugar at the stringpiece within their tariffs and have excluded sugar in the hold of the steam lighter.

POINT IV.

The sugar refined by Arbuckle Brothers begins its rail journey at Jay Street Terminal, and the service performed by the Terminal is part of the transportation.

It is conceded by the Commission that "the Arbuckle dock may doubtless now be regarded as a public receiving station" of the railroads (p. 55). This is so because the railroads by their tariffs have offered to receive freight at this Terminal and by holding themselves out have become carriers to and from Jay Street Terminal. General merchandise shipped by others than Arbuckle Brothers therefore begins its "transportation" from Jay Street Terminal and the contract of the railroads with the Terminal is good in law as to such shipments.

In the same car with this general merchandise may be sugar refined by Arbuckle Brothers in two lots:

1. Sugar consigned by Arbuckle Brothers from Brooklyn to Arbuckle Brothers, Pittsburgh.

2. Sugar bought in New York by a grocer in Chicago and consigned by Arbuckle Brothers in Brooklyn to the purchaser at Chicago with railroad bill of lading issued at Jay Street Terminal to the purchaser or order. On the face of the memorandum of sale is printed in red, "Delivery Complete on receipt of good by Carrier."

This sugar delivered to the railroad with its bill of lading, perhaps negotiable, issued and outstanding the Commission compares with Federal sugar in the hold of its lighter at Pier 24 some miles from any railroad (p 59), writing "a given quantity of sugar is at Pier 24 ready for shipment. * * * At the same time a like quantity of sugar is ready at the Arbuckle Dock for shipment over the same lines."

Our contention is that Arbuckle sugar is shipped when the bill of lading is issued and therein is the vital distinction. The Commission is "inclined to think" the rail journey of this sugar does not begin until the float carrying the cars arrives at the Jersey shore because:

1. The possession is with the Terminal, i. e., with the shipper.

2. The liability for loss is with the Terminal, i. e., with the shipper.

The case of the Peavey elevators, lately decided in this Court and more fully referred to in a subsequent point, is conclusive against these contentions. Peavey and Company took over their own grain from the Union Pacific and at the end of ten days were bounden to deliver it to another carrier starting east. In the meantime, they weighed, cleaned, clipped, cooled and otherwise treated their own

grain. Their possession of their own grain was more complete than the possession of Arbuckle sugar by the Jay Street Terminal. The liability of Peavey and Company for loss is certainly no less. We submit therefore that these two contentions are completely answered by the judgment in that case.

The Statute allows the carrier to contract with the shipper that the latter shall render services and furnish instrumentalities and be paid a just and reasonable compensation and does not distinguish between the commencement, progress and end of the transportation. It is, under terms of the Statute provided that such Terminal facilities as the Jay Street Terminal furnishes are part of the railroad and that the service it performs is within the term transportation.

In New York, at least, there is no doubt of the validity of a contract by which a carrier limits its common law liability.

> Bermel vs. N. Y., N. H. & H. R. Co., 6 App. Div. (N. Y.), 389; aff'd 172 N. Y., 629;
> Zimmer vs. N. Y. C. & H. R. R. Co., 137 N. Y., 460;
> Wheeler vs. Oceanica S. N. Co., 125 N. Y., 155.

When the Terminal receives sugar for shipment and issues a bill of lading for and in the name of the Railroad Company two results follow:

1. Title to the merchandise changes from the consignor to the consignee.

Mee vs. McNider, 109 N. Y., 500.
Wilcox Silver Plate Co. vs. Green, 72 N. Y., 17;
Waldron vs. Romaine, 22 N. Y., 368;
Gilbert vs. R. R. Co., 4 Hun (N. Y.), 317;
Williston on Sales, Sec. 278.

2. The railroad journey and responsibility begins,

Hutchinson on Carriers, Sec. 158;
Abe vs. Eaton, 51 N. Y., 410;

The liability of the carrier, in fact, begins as soon as it receives the merchandise for carriage, even if bills of lading have not been shipped or a journey commenced; the mere reception of the goods for the purpose of immediate transportation is sufficient to inaugurate liability.

Ames vs. Fargo, 114 App. Div. (N. Y.), 666;
Ames vs. Fargo, 42 Hun, 332;
Hutchinson on Carriers, Sec. 113.

It is submitted that the sole distinction between sugar shipped by Arbuckle Brothers to themselves in one and the same car with the general merchandise of another shipper is that the carrier has contracted with the shipper to do a service and furnish an instrumentality of transportation. This the Congress on the recommendation of the Commission has expressly authorized. The Commission, it is submitted, has attempted the partial repeal of the statute.

35

POINT V.

The Commission exceeded its power in forbidding payment to the Jay Street Terminal for handling of Arbuckle Brothers sugar.

This is so because:

1. Jay Street Terminal service is a part of the railroad transportation.

2. The statute allows the carrier to hire the shipper to render such a service and furnish such instrumentality.

3. The allowance is conceded to be no more than is just and reasonable.

The statute provides (Sec. 1; Par. 2):

> "The term 'railroad' as used in this act, shall include all bridges and ferries * * * terminal facilities of every kind * * * all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include * * * all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit * * * and it shall be the duty of every carrier * * * to provide and furnish such transportation."

Under paragraph 3 of section 15 the Statute provides:

> "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allow-

ance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

These sections were considered in a late case in this Court.

I. C. C. vs. Diffenbaugh, 222 U. S. 42.

Peavey & Company owned elevators adjacent to the Union Pacific tracks at Omaha and elsewhere and elevated, weighed, treated and delivered grain, almost exclusively their own grain. The Union Pacific under its contract paid Peavey & Company for this service and Peavey & Company while their grain was in the elevator treated, cleaned, clipped and mixed the grain. The Commission forbade payment for the service of elevating, out of the Union Pacific cars and delivering it into eastbound cars, because weighing, mixing, treating, clipping, cleaning and inspecting the grain in the elevator could not be prevented in practice. It held that these practices operated to give Peavey & Company undue commercial advantage.

The Circuit Court of Appeals suspended the order of the Commission. (Peavey & Co., vs. U. P. R. Co., 176 Fed. 409). This Court modified and affirmed the decree. It was distinctly held in this Court that the incidental commercial advantages arising to the grain owner from treat-

ment of the grain while in the elevator did not amount to a preference or discrimination.

The case at bar is submitted to be stronger for the Jay Street Terminal contract than was the Peavey case, for if elevating grain into an elevator, weighing it and transferring it out to eastbound cars is transportation for which the shipper may be paid *a fortiori* is the maintenance of a railroad terminal, fully equipped with tracks, buildings, locomotives, floats, tugs, etc., and thereat the reception and delivery of freight, the issue of bills of lading, the loading and unloading to and from cars, and the carriage of the empty and loaded cars on floats between Brooklyn and Jersey City. The Peavey case is submitted to be conclusive that the Commission exceeds its powers if it attempts to forbid the payments under a contract permitted by Section 15 on the ground that thereby an unjust discrimination results under Sec. 2 or Sec. 3.

There is nothing modifying the doctrine of the Peavey case in a later case decided in this Court.

U. P. R. Co. vs. Updike Grain Co., 222 U. S.

The Updike Grain Company and other elevator owners recovered judgment against the railroad company for refusals to pay the price named in the tariffs of the railroad for the elevation of grain.

The tariffs stated prices offered to elevators performing certain services on grain in carloads transferred by the elevators at Omaha on the condition, among others, that nothing would be paid when more than forty-eight hours elapsed between the time of delivery of loads by

the Union Pacific to the elevator or connecting lines and the release and return of the empty cars to the Union Pacific. The Union Pacific was a party to the regulations of the American Railway Association which required that each car received loaded in switching service should be confined to switching territory and be returned when empty to its owner, if that owner had a track connection with the switching territory and under this rule every connecting carrier had and exercised the right to retain in its possession its empty cars. A portion of the damages recovered, consisted of an amount equal to the charge for elevation on grain unloaded by the elevators from cars belonging either to the company which performed the switching service or a company which had a track connection in the switching territory. These cars when empty were not and could not be transferred back to the Union Pacific under the governing rules. They were retained by their owners and Counsel for the Union Pacific Railroad Company contended that no damages could be recovered for failure to pay the elevation charges upon those cars, because the tariff of the Union Pacific declared that the condition of the payment for elevation was that the empty cars should be returned to the Union Pacific within forty-eight hours after their delivery to the connecting lines. The Court held that the attempt of the Union Pacific Railroad Company to enforce the forty-eight hour rule in disregard of the rule of the Association, that owners should retain empty cars, worked an unlawful discrimination. The rules of the Association also required that foreign cars after being emptied should be loaded by same

route so that the home road would participate in the freight or loaded to an intermediate road in the direction of the home road. The Union Pacific attempted to make the forty-eight hour rule of its tariff superior to this rule of the association and refused to pay for grain unloaded from foreign cars and loaded back under this rule and this also was held to be an unjust discrimination.

In the Updike case the service performed by the Updike Grain Company was the exact equivalent of the service performed by the Peavey Company. It was the exact service for which the Union Pacific in and by its tariff offered to pay the Updike Company, and the judgment went no further than to give specific performance of the offer made in and by the tariff to the shipper, and damages for failure to perform.

POINT VI.

It is beyond the power of the Commission to order payments to the Federal Company for lightering sugar from Pier 24 to the railroad terminals in New Jersey.

Wight vs. U. S., 167 U. S., 512;
Chic. & Al. R. Co. vs. U. S., 156 Fed., 558;
Gen'l. E. Co. vs. N. Y. C. & H. R. Co., 14 I. C. C., 237;
Solvay Process Co. vs. D., L. & W. R. Co., 14 I. C. C., 246;
Matter Allowance for Transfer of Sugar, 14 I. C. C., 619.

In the last case the Commission had before it the payment by Railroad Companies to all refiners in and about New York for the transfer of sugar from the refineries to the several railroads and among others the Federal Company and Arbuckle Brothers. The railroads allowed two cents per 100 pounds for carrying sugar in trucks or by hand or otherwise to the railroad. The Federal Company moved its sugar at Yonkers to the New York Central terminals by hand trucks, making store door delivery directly into the railroad cars. Arbuckle Brothers moved their sugar by horse drawn trucks, several blocks from the Arbuckle refinery, to the Jay Street Terminal. The American Sugar Refining Company moved their sugar in horse drawn trucks from the refinery to the Brooklyn Eastern District Terminal. The Commission wrote, as follows (627, 628):

> "All the tariffs purport to make the allowance as compensation for transfer. It necessarily follows that if the allowance is to be sustained the transfer of goods to the possession of the carrier must be held to be the carrier's duty, for which the shipper making the transfer is entitled to compensation. Such is not the law, and the first to resist an attempt to impose such duty upon the carriers would be the carriers themselves. Within the present year this Commission has decided at least two cases in favor of carriers involved in this proceeding and has held that the delivery of goods to a carrier and the receipt of goods from a carrier are duties devolving upon the shipper, for which the carrier can not be compelled to pay. For carriers to undertake to make to shippers allowances based upon the performance by the shippers for them-

selves of services which they are legally bound to do for themselves is for the carriers to violate the act to regulate commerce."

No difference in principle exists between the carriage in trucks by the American Company to the Brooklyn Eastern District Terminal and by Arbuckle Brothers to the Jay Street Terminal and the carriage in lighters by the Federal Company from Pier 24 to the Jersey Terminals. And since the allowance for carting sugar in trucks to the railroad terminals is held to be unlawful, so must also be held unlawful the payment of any allowance to the Federal Company for lightering sugar across the North River.

The logic of the report and order of the Commission leads inevitably to the payment to the American Sugar Refining Company of 3 cents and 4 1/5 cents per 100 pounds for carrying their sugar in trucks from their refineries to the Brooklyn Eastern District Terminal, in place of the 2 cents per 100 pounds which the Commission forbade.

The Report of the Commission in the case at bar condemns the proposed allowance to the Federal Company (p. 49). It asserts that Havemeyer and Elder, the predecessor of the American Sugar Refining Company, "for many years enjoyed illegal preferences at the hands of the carriers," and continues: "It is also our understanding that when Arbuckle Brothers began to compete with the Havemeyer refineries these allowances were extended to them."

If allowances for lightering sugar to railroad terminals

were illegal when granted to Arbuckle Brothers, are they to be made legal by the order of the Commission to put Federal Company on the same basis? Is it sound argument to condemn Arbuckle Brothers for seeking, in 1903, before the light of modern jurisprudence shone upon this subject, the allowances which the learned Commission forces the railroads to pay to the Federal Company?

It may be granted that the payments were in their origin rebates and offended against the law and it may be conducive to a better understanding of their present status to study their history; but this is the conclusion the Commission reaches (p. 89):

> "It was not until after the regulating body had been strengthened by additional legislation that the two docks seem to have been designated, in the published tariffs of the defendants, as railway terminals and were thus made to subserve the convenience of such of the general shipping public in Brooklyn as might be able to use them."

The Congress in 1906 adopted the suggestion of the Commission and authorized carriers to make contracts such as is here set forth.

The Commission has ignored the distinction between such an accessorial lighterage service before transportation begins as the Federal Company furnishes and the maintenance of the railroad terminal in Brooklyn and the transportation thence of freight by Jay Street Terminal.

POINT VII.

It is not a discrimination to contract with the Jay Street Terminal to maintain a railroad freight station in Brooklyn and there to collect, receive and deliver freight, issue bills of lading and float loaded cars between Brooklyn and Jersey City, and at the same time refuse to contract with the Federal Sugar Refining Company for lighterage from Pier 24.

The contract with the Erie Railroad set forth in the record was made February 5, 1906. It was lawfully made and worked no discrimination. It continued lawful and worked no discrimination until July 13, 1909, when the Interstate Commerce Commission had dismissed the complaint of the Federal Sugar Refining Company of Yonkers (p. 38). On July 20, 1909, the date set forth in the petition of the Federal Sugar Refining Company (p. 40), it became unlawful and a discrimination because Mr. C. A. Spreckels and his associates had deliberately changed their corporate name and residence and now stopped their lighter at Pier 24, North River, on the way from Yonkers, to the railroad terminals in New Jersey with the express purpose of bringing themselves within the opinion of Commissioner Clark in the first case.

In short, the plaintiff deliberately created the discrimination for which it has been adjudged entitled to relief.

The forbidden discrimination is an unjust one and arises when different rates are charged shippers "for like and contemporaneous services * * * under substantially similar circumstances."

I. C. C. vs. B. & O. R. R. Co., 145 U. S., 276.

Jay Street Terminal maintains a great union railroad freight station in Brooklyn. They receive and deliver the freight of consignors and consignees. They issue bills of lading; they insure freight in cars against fire and marine risks and are liable for it afloat; they "float" loaded and empty cars between Brooklyn and Jersey City and are paid for all these services and instrumentalities less than the cost of the service.

At the same time, these railroad companies, in and by their tariffs, offer to lighter sugar and other freight from Pier 24 and other Manhattan piers, for any shipper, free of charge. The Federal Company, contending that it is a shipper from Pier 24, has refused to accept free lighterage and demands to be allowed to deliver its sugar to the railroads in New Jersey and to be paid all that Jay Street Terminal receives for all services above detailed. It is submitted, that the services are utterly unlike and the circumstances totally dissimilar and that the error into which the Commission fell is an error of law.

The case of the Federal Company would surely be stronger if it were at the Brooklyn shore and offered to furnish exactly similar terminal facilities. Take the case of the American Sugar Refining Company, which is in Brooklyn, and in 1910 shipped from the Brooklyn Eastern District Terminal over 400,000 tons of sugar. The discrimination, if one exists, is as great against the American Company as against the Federal Company. Assume that the American Company complained and offered to furnish a terminal station upon the same terms as Jay Street or Eastern District Terminal. It is submitted that the rail-

road companies could refuse upon the ground that they had established sufficient terminals to receive and deliver and carry all freight; their duty being to provide reasonable facilities. It has been held in this Court that it is not a violation of Section 3 to make an exclusive contract, and that the railroad having made such a contract with one stockyard company could refuse to make deliveries at another.

> Cen. Stockyards Co. vs. L. & N. R. Co., 118 Fed., 113; affirmed, 192 U. S., 568.

See also,

> Covington S. Y. Co. vs. Keith, 139 U. S., 128;
> U. S. vs. D., L. & W. R. Co., 40 Fed., 101.

The Commission has held that it is lawful for a railroad to procure equipment by lease from one shipper and to refuse to make identical contracts with other shippers.

> Consol. Forwarding Co. vs. So. P. Co., 9 I. C. C., 182;
> Worcester Ex. Co. vs. P. R. Co., 3 I. C. C., 577.

The opinion of the Commission in the matter of refrigerator cars is instructive.

> Matter of Trans. of Fruit, 10 I. C. C., 360.

The Commission investigated the subject upon its own motion, after complaints from shippers of fruit in Michigan, that railroads had made exclusive contracts for the use of Armour cars. Commr. Prouty wrote (p. 373):

> "The defendant railways may provide such cars either by purchase on their own account or by lease

from other roads, and if the latter plan is adopted they may undoubtedly enter into exclusive contracts like that before us. This has been settled by the Supreme Court of the United States, Pullman Palace Car Co. vs. Missouri P. R. Co., 115 U. S., 587, 29 L. Ed., 499; 6 Sup. Ct. Rep., 194; Express Cases, 117 U. S., 1; 29 L. Ed., 791; 6 Sup. Ct. Rep., 542, 628. Still more directly in point are those cases in which it has been held that a railway may provide facilities for receiving and delivering live stock by the making of an exclusive contract with one of two or more stock yards operating at the same point; Central Stock Yards Co. vs. Louisville & N. R. Co., 192 U. S., 568, 48 L. Ed., 565; 24 Sup. Ct. Rep., 339; Railroad Commission vs. Louisville & N. R. Co., 10 I. C. C. Rep., 173."

Commr. Prouty, we submit, correctly interprets the decision of this Court in the Central Stockyards case that a railway may provide facilities for receiving and delivering live stock by making an exclusive contract with one shipper and refusing another shipper at the same point, and it follows that it may make the contract under review with the Jay Street Terminal and refuse the contract demanded by Federal Company.

A study of the Brooklyn Eastern District Terminal and the American Sugar Refining Company will be instructive. In the first case the Federal Company complained of Arbuckle Brothers and the Jay Street Terminal and of the American Sugar Refining Company and Brooklyn Eastern District Terminal. It was proved that the interest of the American Company in Eastern District Terminal was "a negligable quantity."

The Report in the first case states (p. 31):

"The relationship existing between the American Sugar Refining Company and the Brooklyn Eastern District Terminal, by means of stock ownership in the former by members of the firm who own the latter, is apparently so slight as to require no comment, and that question was virtually waived on the hearing."

The Report in the first case further states (p. 32):

"Moreover, it is evident that the disadvantage of complainant does not arise from the fact that Arbuckle Brothers own and operate the Jay Street Terminal, but rather and simply from the fact that they are within while complainant is outside of the free-lighterage district. If Arbuckle Brothers should transfer that terminal to the defendants, or to an outside party and cease to have any interest in it whatever, complainant would derive no appreciable benefit."

The fact is that Havemeyer and Elder owned a refinery adjoining the Brooklyn Eastern District Terminal and owned also that Terminal. They sold their refinery to the American Sugar Refining Company (Report, p. 28). The American Company continued to have all the facilities of the terminal. When the Federal Sugar Company made its second complaint it omitted all reference to the American Company or to the Brooklyn Eastern District Terminal. This, it is submitted, virtually admits that Arbuckle Brothers have no advantage from the Jay Street Terminal.

The Report answers the argument that no discrimination exists because the railroad companies can lawfully buy or

rent the terminal and the margin against the Federal Company would remain. The learned Commissioner wrote (p. 2):

> "A carrier may doubtless wrongfully give a great shipper a substantial advantage by buying or renting his warehouse adjoining his factory or place of business and making it a public receiving station, thus relieving him of the expense of hauling his merchandise by wagon to its regular receiving station. *And possibly under the act as it now stands we would be powerless to redress the wrong, if the public made actual use of the new station, unless the price paid or the rent reserved were excessive and the transaction was therefore intended as an unlawful rebate as well as a continuing daily advantage to that shipper.* But when the carrier engages the shipper to operate his warehouse as a railroad terminal and in the arrangement gives him advantages in handling his own traffic that are denied to his competitor, the test proposed, as above described, does not satisfy the principle underlying the act, as we shall see more fully later in this report."

The italicized clause is submitted to be the conclusive answer to the whole argument of the Commission, for it is nowhere pretended that the compensation of Jay Street Terminal is excessive.

The "advantages in handling his own traffic that are denied to his competitor" were stated by Mr. Farrell in the Court below, to be freedom from risks of negligence to which might be added more rapid and certain delivery. The case of the Peavey elevators previously decided is the answer to this proposition.

POINT VIII.

It is beyond the power of the Commission to allow more than the cost of lighterage to the Federal Company to offset less than cost paid the Jay Street Terminal for its services.

The cost to lighter sugar from Yonkers to Pier 24 (over 12 miles) and thence across the North River to the railroad terminals in Jersey City is 3 cents per 100 pounds. The cost from Pier 24 to the Jersey shore is only a fraction of this 3 cents, while the allowance ordered is 3 cents for some sugar and 4 1-5 cents for other sugar, which means a very large profit. The Commission has held and its order in the Peavey case to that effect stands unreversed that more than cost must result in a rebate. Concerning Jay Street Terminal, all of the evidence as to cost was given on the first hearing. Commr. Knapp wrote (Record p. 32):

> "Upon the present record it is not shown that any profit accrues to the Jay Street Terminal under the payments now made, as stated above, of 3 and 4 and 1/5 cents per 100 pounds. Indeed, the only inference which can be drawn from the proof submitted is that the Jay Street Terminal does not receive a reasonable return upon the investment. If this be the truth of the matter, as must be assumed on the evidence now before us, we are unable to perceive that the existing relationship between the defendants and this terminal company is illegal or results in any violation of the act. The fifteenth section as amended clearly implies that a just and reasonable allowance may be made to the owner of property transported, when such owner renders a service connected with or furnishes an instrumentality used in the transportation. This provision,

for aught we can see, applies to the Arbuckle concern, and nothing has been made to appear which indicates that the allowance to that concern exceeds the authorized measure of compensation."

Commr. Harlan upon the second hearing did not question the accuracy of these figures. He wrote (Record p. 51):

"It is also urged that the investment of Arbuckle Brothers in their dock property approximates $1,200,000, and that the net earnings from its operation in 1907 as a terminal for the defendants amounted to but $35,566.84, this being only slightly in excess of 3 per cent. on the investment, nothing being allowed for interest and depreciation. Net earnings, as everyone knows, vary with the character and extent of the items embraced on the expense side of the account. But the accuracy of these figures may be admitted without bringing us any nearer to a solution of the problem presented to us by the complainant."

The Commission in the second case separated the maintenance of the freight terminal in Brooklyn from the carriage of the sugar thence to Jersey City and called the floating of loaded cars from Brooklyn to Jersey City the exact equivalent of lighterage of Federal Sugar from Pier 24. That was an error of law. The contract of the Terminal covers the land, buildings, piers, sheds, tracks, etc., in Brooklyn and the floating equipment and the reception and delivery of all kinds of freight and the carriage of it between Brooklyn and Jersey City. General mer-

chandise in the year 1907 was two-thirds of all handled in Jay Street Terminal and in 1910 was 56 per cent. The gross result of handling the entire traffic is the criterion.

> Minn. & St. L. R. Co. vs. Minnesota, 186 U. S., 257.

In that case the railroad company complained of an order of the Minnesota Commission which fixed a rate for the carriage of coal below the cost of the transportation and this Court held that if other merchandise made up the loss and left a reasonable profit the railroad could not complain. The reason and the rule of that case applied to this condemns the rule adopted by the Commission.

In The Matter of Allowance for the Transfer of Sugar (14 I. C. C., 619) the Commission wrote (Opin. 628):

> "Moreover, an allowance that is really paid for transfer should be equal to the transfer expense in each case. Here the carriers, on the basis of an assumption of transfer, pay some, if not all the shippers more than their transfer expense. From the record it appears that in 1907 there was shipped from the refineries at Brooklyn, Jersey City, and Yonkers to points west of trunk line territory 1,330,000,000 pounds of sugar. Upon this amount the allowance of 2 cents per 100 pounds was paid. It further appears from the record and is admitted by all counsel filing briefs that 30 per cent. of the above tonnage was received by the carriers at the store doors of the shippers and therefore was not the occasion of transfer expenses to the shippers. It thus appears that the carriers in this proceeding in the year 1907 paid to refineries shipping sugar

> from New York and vicinity for transfer of their shipments to the possession of the carriers \$266,000. It further appears that 399,000,000 pounds of the sugar upon which transfer allowance was so paid was received by the carriers at the store doors of the shippers, the sum of \$79,800 being nevertheless paid to these shippers for transfer. It is not considered that any criticism of the tariffs or the practice under them need go further than this bare statement of the results."

It is submitted that the order of the Commission is subject to just the condemnation which the Commission pronounced in the case cited.

POINT IX.

Arbuckle Brothers, and Jay Street Terminal are separate and distinct entities.

Under Article I, Section 1 of the Partnership Law of the State of New York, a partnership may be formed for the purpose of engaging in any lawful trade or business. Under Article III, Sections 20 and 21 of the same law, the persons forming such partnerships as the Jay Street Terminal and Arbuckle Brothers are required to sign and acknowledge certificates declaring the person or persons intending to deal under such name, with their respective places of residence, and file the same in the Clerk's office of the County where the principal place of business is located, and cause copies of such certificate to be published once in week for four consecutive weeks in a newspaper of the

city in which such principal place of business is located. This provision of the law was complied with by the Jay Street Terminal and Arbuckle Brothers.

It is elementary that a partner may engage with other persons in a partnership business outside the scope of his firm business, provided it does not compete therewith.

> American and English Ency. of Law, Vol. 22, p. 118.
> Gossett vs. Wilson, 3 Fla., 235.
> Weaver vs. Weaver, 46 N. H., 188.

It necessarily follows that if one partner may engage in a separate and distinct business with other persons under a different partnership name, he may also engage in a separate and distinct business under a different name with the same persons who constitute the firm of which he is already a member. *These two partnerships composed of the same individual members engaged in separate and distinct enterprises under different names are in the eyes of the law separate and distinct entities.*

Under the Bankrupt Act a partnership is a separate and distinct legal entity from the individuals who compose it.

> Collier on Bankruptcy (pp. 114, 115, 116).
> In re Sunderlin, 109 Fed. Rep., 857.
> In re McMurtrey, 142 Fed. Rep., 853.

A partnership may be adjudged a bankrupt although the partners who compose it are not so adjudicated. (In re Bertenshaw, 157 Fed. Rep., 363.)

The Bankrupt Act is merely declaratory of recognized equitable principles in the administration of insolvent partnerships.

Hewitt vs. Northrup, 75 N. Y., 506.
Wilder vs. Keeler, 3 Paige, 67.

It necessarily follows from the rules of law above stated that the partnership known and recognized under the law of the State of New York as "Jay Street Terminal" is a distinct legal entity from the partnership known as "Arbuckle Brothers." These two partnerships though composed of the same individual members are engaged in totally different enterprises. The business of each is conducted separate from that of the other. The creditors of and persons dealing with either of them most likely do not know that the same individuals are partners in both as the business of the one is so different from the business of the other that the same persons do not deal with both.

Each must be adjudicated a bankrupt separate and distinct from the other in order that their assets may be marshalled and equitably distributed among their respective creditors. The Trustee of each partnership would be entitled to prove any claim that the one partnership might have against the other. The creditors of each partnership would be entitled to payment of their respective claims out of the assets of the debtor partnership before creditors of the other partnership or creditors of the individual partners could resort thereto. The sums of money paid the Jay Street Terminal by the complainant railroad companies for the transportation of sugar shipped by Arbuckle

Brothers may never reach Jamison and Arbuckle as individuals, for the reason that such money may be required to pay off the claims of the creditors of Jay Street Terminal under their prior equitable right thereto. This application and use of these moneys cannot be determined until the partnerships have been wound up and their respective debts paid. For these reasons the contracts made by the complainant railroad companies with Jay Street Terminal for the use of its terminal as a union freight depot are not contracts made with or for the benefit of the partnership of Arbuckle Brothers. The Jay Street Terminal is not a manufacturer and shipper of sugar and therefore its creditors have the right to see that it receives the benefit of the contract made with the railroad companies for the use of its terminal.

POINT X.

Irreparable damage would be done if the order of the Commission is allowed to become effective.

The order gives to the railroad companies the option to pay both Jay Street Terminal and the Federal Company or to cease and desist from any payment to either.

If the railroad companies cease and desist the Jay Street Terminal will suffer irreparable damage for it will lose at least a third of its business.

If the Jay Street Terminal perform the contract for account of the railroads and carry Arbuckle's sugar awaiting the final disposition of this suit and the decision should finally be in its favor that the contract is valid the loss

will be irreparable for the railroad companies would beyond doubt answer that the contracts were suspended and during the interval destroyed, by order of the Commission.

It is submitted that the Jay Street Terminal should not be put to the risk of the issue of such a litigation.

If on the contrary the railroad companies pay both Jay Street Terminal and Federal Sugar Company, as they may do, Arbuckle Brothers are irreparably damaged for their competitor will get three cents per hundred pounds for some of its sugar and 4 1-5 cents for a good portion of this sugar and for a service that costs nothing. The Federal will get a compensation.

(1) Which is not in the tariffs and is therefore not to be presumed reasonable.

(2) Which has been proved to be excessive, unjust and reasonable.

There would therefore be an unfair and unjust compensation to Federal Company and an unlawful discrimination against Arbuckle Brothers.

POINT XI.

The order of the Commerce Court should be affirmed.

WILLIAM N. DYKMAN,
of Counsel for
Jay Street Terminal
and Arbuckle Brothers.

DYKMAN, OELAND & KUHN,
Intervenors Attorneys.

UNITED STATES, INTERSTATE COMMERCE COMMISSION, AND FEDERAL SUGAR REFINING COMPANY *v.* THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 722. Argued January 15, 16, 1912.—Decided June 10, 1912.

The Commerce Court has jurisdiction of a petition of a carrier to restrain an affirmative order of the Interstate Commerce Commission that it desist from paying allowances for lighterage to one shipper unless it pays the same to other shippers, and also has power to determine whether such order was entitled to be enforced.

The Commerce Court has power to allow a preliminary injunction against the enforcement of an order of the Interstate Commerce Commission directing the carrier to desist from paying allowances for lighterage.

An appeal to this court from an interlocutory order of the Commerce Court allowing a preliminary injunction against the enforcement of an affirmative order of the Interstate Commerce Commission lies under § 2 of the act creating the court, now § 210 of the new Judicial Code.

Under § 210 of the Judicial Code, injunction orders can be issued by the Commerce Court restraining the enforcement of an order of the Interstate Commerce Commission in the following classes of cases:

First. A temporary restraining order staying in whole or in part the operation of the order for not more than sixty days to be allowed by the court or a judge thereof.

Second. A preliminary injunction to restrain or suspend in whole or in part the operation of the Commission's order *pendente lite* to be granted by the court.

Third. A perpetual injunction upon entry of final decree.

The requirements in § 210, Judicial Code, that a restraining order must contain a statement of facts as to irreparable damage resulting from the order of the Commission relate only to the first class of cases.

This court will not apply to the construction of the equity powers of a statutory court, general principles of equity, if the effect would be to destroy the law creating the court by expunging therefrom the very powers which Congress intended to grant; and so *held* that the power given by § 210, Judicial Code, to the Commerce Court to issue an injunction *pendente lite* was to enable that court to have proper time for consideration, and the right of appeal to this court was given as a safeguard against a possible abuse of the power to issue the order; and the order will not be reversed in the absence of such abuse.

Where Congress creates a special tribunal for a special class of cases with an appeal to this court it is the duty of this court to give effect to that purpose and uphold the lawful authority of the court so created and to also correct abuse of power when it appears.

In this case, *held*, that there was no abuse of power in issuing the order for an injunction *pendente lite* and the order is affirmed and the case remanded so that there may be opportunity to dispose of it in the forum selected by Congress for that purpose.

THE facts, which involve the jurisdiction of the Commerce Court and its power to issue restraining orders and injunctions, are stated in the opinion.

The Solicitor General for the United States:

A carrier cannot make the ownership of commodities the test of its duty to carry them or the criterion of the rates for carriage. *Interstate Com. Comm.* v. *Delaware, L. & W. R. R. Co.*, 220 U. S. 235. For the same reason the carrier may not inquire as to the place of origin and base its rates upon that.

A carrier may not make rules which discriminate between shippers standing in substantially the same relation to it. *Union Pacific R. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215.

Mr. P. J. Farrell for the Interstate Commerce Commission:

A carrier may establish a separate charge for terminal

services which are in addition to and entirely separate and distinct from the transportation; and where such separate charge is established it must be considered as applicable only to the services covered thereby as shown by the tariffs of the carrier published and filed according to law. *Interstate Com. Comm.* v. *Stickney*, 215 U. S. 98. And see *Southern Ry. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297.

One provision of the Interstate Commerce Act may not be seized upon and used regardless of other provisions of the same act to justify inequalities in the treatment accorded by carriers to shippers. The act was enacted for the purpose of preventing such inequalities. *Interstate Com. Comm.* v. *Balto. & Ohio R. R. Co.*, 145 U. S. 263; *Union Pacific Ry. Co.* v. *Goodridge*, 149 U. S. 680; *Cinn., N. O. & T. P. Ry. Co.* v. *Interstate Com. Comm.*, 162 U. S. 184; *Texas Pacific Ry. Co.* v. *Interstate Com. Comm.*, 163 U. S. 197; *Interstate Com. Comm.* v. *Cinn., N. O. & T. P. Ry. Co.*, 167 U. S. 479; *Union Pacific R. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215; *Wight* v. *United States*, 167 U. S. 512; *Interstate Com. Comm.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144; *East Tennessee, V. & G. Ry. Co.* v. *Interstate Com. Comm.*, 181 U. S. 1; *New York, N. H. & H. R. R. Co.* v. *Interstate Com. Comm.*, 200 U. S. 361; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Interstate Com. Comm.* v. *Chicago G. W. Ry. Co.*, 209 U. S. 108; *Interstate Com. Comm.* v. *Illinois Cent. R. R. Co.*, 215 U. S. 452; *Interstate Com. Comm.* v. *Delaware, L. & W. R. R. Co.*, 220 U. S. 235.

The Commerce Court erred in substituting its own judgment for that of the Commission concerning the character of the discrimination which constituted the basis of the Commission's order. *Interstate Com. Comm.* v. *Illinois Cent. R. R. Co., supra; Baltimore & Ohio R. R. Co.* v. *United States ex rel. Pitcairn*, 215 U. S. 481; *Southern Pacific Co.* v. *Interstate Com. Comm.*, 219 U. S. 433; *Inter-*

state Com. Comm. v. *Delaware, L. & W. R. R. Co.*, 220 U. S. 235.

Mr. Ernest A. Bigelow for the Federal Sugar Refining Company:

The Commission's findings of fact, supported as they are by the evidence, will not be reviewed by this court, *Interstate Com. Comm.* v. *Delaware, L. & W. R. R. Co.*, 220 U. S. 235; and its conclusions of law were correctly drawn. See *Coe* v. *Erroll*, 116 U. S. 517; *L. & L. F. Ins. Co.* v. *R., W. & O. R. R.*, 144 N. Y. 200; *Penn. Ry.* v. *Int. Coal Mining Co.*, 173 Fed. Rep. 1.

The Act to Regulate Commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference, and the incidental and wholly subordinate provisions of § 15 cannot be allowed to frustrate the fundamental purpose of the act. *Interstate Com. Comm.* v. *Illinois Cent. Ry. Co.*, 215 U. S. 477.

As to the so-called admission made by counsel for the Federal Sugar Refining Company. Even if made with the full force and effect attributed to it, it is immaterial, as the Commission has the power in the public interests to consider the whole subject, disembarrassed by any supposed admissions, even if contained in the complaint. *C. H. & D. Ry.* v. *Interstate Com. Comm.*, 206 U. S. 142.

On this appeal the court may properly consider and decide the whole cause on the merits. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, citing *Knoxville* v. *Africa*, 77 Fed. Rep. 501; *Green* v. *Mills*, 69 Fed. Rep. 852.

Mr. George F. Brownell, with whom *Mr. Herbert A. Taylor* was on the brief, for railroad companies, appellees:

The service performed by the Federal Sugar Refining Company through the medium of the Ben Franklin Trans-

portation Company is not a transportation service of the railroad companies, but is wholly accessorial and cannot lawfully be paid for by these appellees. *In re Allowances for Transfer of Sugar*, 14 I. C. C. 619; *Wight* v. *United States*, 167 U. S. 512; *Chicago & Alton Ry. Co.* v. *United States*, 156 Fed. Rep. 558; *General Electric Co.* v. *N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237; *Solvay Process Co.* v. *D., L. & W. R. R. Co.*, 14 I. C. C. 246.

The employment of the Jay Street Terminal to act as the public freight station of these appellees in receiving and delivering freight and to perform floatage and lighterage service was perfectly lawful. Both the Commission and the courts have held that railroads may secure and maintain freight depots by contract with shippers and that such depots thereby become legally and to all intents and purposes the freight depots of the railroads. *Central Stock Yards Co.* v. *L. & N. Ry. Co.*, 192 U. S. 568; *Railroad Commission* v. *L. & N. Ry. Co.*, 10 I. C. C. 173; *Cattle Raisers' Assn.* v. *C., B. & Q. R. R. Co.*, 11 I. C. C. 277.

The entering into a contract with one shipper to furnish station facilities does not result in a violation of the provisions of the Act to Regulate Commerce forbidding undue preferences and advantages, even if similar contracts are not made with all competing shippers in the same locality. *Central Stock Yards Co.* v. *L. & N. Ry. Co.*, 118 Fed. Rep. 113, 117; aff'd, 192 U. S. 568; *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 136; *Butchers' & Drovers' Stock Yards Co.* v. *L. & N. Ry. Co.*, 67 Fed. Rep. 35; *United States* v. *Delaware, L. & W. R. Co.*, 40 Fed. Rep. 101; *Consolidated Forwarding Co.* v. *Southern P. Co.*, 9 I. C. C. 182, 206; *Worcester Co.* v. *Pennsylvania R. R. Co.*, 3 I. C. C. 577, 584; *Re Transportation of Fruit*, 10 I. C. C. 360.

An unjust discrimination or an undue preference is not created by the action of a railroad company in employing a shipper to perform a part of the transportation service, when the shipper is paid a compensation that is reasonable

for the performance of the service, simply because other shippers who are not in position to perform the same transportation service may be subjected to disadvantages. *Peavey & Co.* v. *Union Pacific R. Co.*, 176 Fed. Rep. 409; aff'd, 222 U. S. 42.

Mr. William N. Dykman for Jay Street Terminal and Arbuckle Brothers, intervenors:

This court reviews the findings of the Interstate Commerce Commission upon appeal from an order granting an injunction suspending the order of the Commission. *Interstate Com. Comm.* v. *Delaware, L. & W. R. Co.*, 216 U. S. 531; *Interstate Com. Comm.* v. *Northern Pacific R. Co.*, 216 U. S. 538. See, also, *Missouri, K. & T. Ry. Co.* v. *Interstate Com. Comm.*, 164 Fed. Rep. 645; *Kentucky Bridge Co.* v. *Louisville & N. Ry. Co.*, 37 Fed. Rep. 567.

On an appeal from an order granting an injunction *pendente lite* the appellant must show that no cause of action is stated in the bill. *Hudson R. T. Co.* v. *W. T. & R. R. Co.*, 121 N. Y. 397.

No commission, nor any court, can treat that as a public or private wrong which the Congress has authorized. *Hammersmith &c. R. Co.* v. *Brand*, 4 H. L. Cas. 171; *Bellinger* v. *N. Y. C. R. Co.*, 23 N. Y. 42.

In New York, at least, there is no doubt of the validity of a contract by which a carrier limits its common-law liability. *Bermel* v. *N. Y., N. H. & H. R. Co.*, 6 App. Div. 389; aff'd, 172 N. Y. 629; *Zimmer* v. *N. Y. C. & H. R. R. Co.*, 137 N. Y. 460; *Wheeler* v. *Oceanica S. N. Co.*, 125 N. Y. 155.

When the terminal receives sugar for shipment and issues a bill of lading for and in the name of the railroad company, title to the merchandise changes from the consignor to the consignee, *Mee* v. *McNider*, 109 N. Y. 500; *Wilcox Silver Plate Co.* v. *Green*, 72 N. Y. 17; *Waldron* v. *Romaine*, 22 N. Y. 368; *Gilbert* v. *R. R. Co.*, 4 Hun, 317; Williston on

Sales, § 278; and the railroad journey and responsibility begins, Hutchinson on Carriers, § 158; *Abe* v. *Eaton*, 51 N. Y. 410. The liability of the carrier, in fact, begins as soon as it receives the merchandise for carriage, even if bills of lading have not been shipped or a journey commenced; the mere reception of the goods for the purpose of immediate transportation is sufficient to inaugurate liability. *Ames* v. *Fargo*, 114 App. Div. 666; *S. C.*, 42 Hun, 332; Hutchinson on Carriers, § 113.

The sole distinction between sugar shipped by Arbuckle Brothers to themselves in one and the same car with the general merchandise of another shipper is that the carrier has contracted with the shipper to do a service and furnish an instrumentality of transportation. This the Congress, on the recommendation of the Commission, has expressly authorized.

The Commission exceeded its power in forbidding payment to the Jay Street Terminal for handling Arbuckle Brothers' sugar, because the terminal service is a part of the railroad transportation, the statute allows the carrier to hire the shipper to render such a service and furnish such instrumentality, and the allowance is conceded to be no more than is just and reasonable. *Interstate Com. Comm.* v. *Diffenbaugh*, 222 U. S. 42; *Union Pacific R. Co.* v. *Updike Grain Co.*, 222 U. S. 215.

It is beyond the power of the Commission to order payments to the Federal Company for lightering sugar to the railroad terminals. *Wight* v. *United States*, 167 U. S. 512; *Chicago & Alton R. Co.* v. *United States*, 156 Fed. Rep. 558; *General Electric Co.* v. *N. Y. C. & H. R. Co.*, 14 I. C. C. 237; *Solvay Process Co.* v. *D., L. & W. R. Co.*, 14 I. C. C. 246; *Matter of Allowance for Transfer of Sugar*, 14 I. C. C. 619.

It is not a discrimination to contract with the Jay Street Terminal to maintain a railroad freight station in Brooklyn and there to collect, receive and deliver freight,

issue bills of lading and float loaded cars between Brooklyn and Jersey City, and at the same time refuse to contract with the Federal Sugar Refining Company for lighterage from Pier 24. *Interstate Com. Comm.* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 276; *Central Stock Yards Co.* v. *L. & N. R. Co.*, 118 Fed. Rep. 113; aff'd, 192 U. S. 568. See, also, *Covington S. Y. Co.* v. *Keith*, 139 U. S. 128; *United States* v. *D., L. & W. R. R. Co.*, 40 Fed. Rep. 101.

It is lawful for a railroad to procure equipment by lease from one shipper and to refuse to make identical contracts with other shippers. *Consol. Forwarding Co.* v. *Southern Pacific Co.*, 9 I. C. C. 182; *Worcester Ex. Co.* v. *P. R. Co.*, 3 I. C. C. 577. See, also, *Matter of Trans. of Fruit*, 1 I. C. C. 360.

It is beyond the power of the Commission to allow more than the cost of lighterage to the Federal Company to offset less than cost paid the Jay Street Terminal for its services. *Minn. & St. L. R. Co.* v. *Minnesota*, 186 U. S. 257; *Matter of Allowance for Transfer of Sugar*, 14 I. C. C. 619.

It is elementary that a partner may engage with other persons in a partnership business outside the scope of his firm business, provided it does not compete therewith. Am. & Eng. Ency. of Law, Vol. 22, p. 118; *Gossett* v. *Wilson*, 3 Florida, 235; *Weaver* v. *Weaver*, 46 N. H. 188.

It necessarily follows that if one partner may engage in a separate and distinct business with other persons under a different partnership name, he may also engage in a separate and distinct business under a different name with the same persons who constitute the firm of which he is already a member. These two partnerships composed of the same individual members engaged in separate and distinct enterprises under different names are in the eyes of the law separate and distinct entities.

Under the Bankrupt Act a partnership is a separate and distinct legal entity from the individuals who compose it.

Collier on Bankruptcy, pp. 114, 115, 116; *In re Sunderlin*, 109 Fed. Rep. 857; *In re McMurtrey*, 142 Fed. Rep. 853.

A partnership may be adjudged a bankrupt although the partners who compose it are not so adjudicated. *In re Bertenshaw*, 157 Fed. Rep. 363.

The Bankrupt Act is merely declaratory of recognized equitable principles in the administration of insolvent partnerships. *Hewitt* v. *Northrup*, 75 N. Y. 506; *Wilder* v. *Keeler*, 3 Paige, 67.

Arbuckle Brothers and Jay Street Terminal are separate and distinct entities.

Mr. H. B. Closson filed a brief for the Brooklyn Eastern District Terminal, appellee.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This is a suit instituted in the Commerce Court to enjoin the enforcement of an order by the Interstate Commerce Commission.

The complainants in the bill are The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna and Western Railroad Company, The Erie Railroad Company, The Lehigh Valley Railroad Company, The New York, Ontario and Western Railway Company, and The Pennsylvania Railroad Company. The Brooklyn Eastern District Terminal and John Arbuckle and William A. Jamison, copartners, trading as the Jay Street Terminal, intervened and were made parties complainant, they being interested to defeat the order of the Commission.

The defendant named in the bill is the United States. The Interstate Commerce Commission appeared, and the Federal Sugar Refining Company intervened and was made a party defendant.

The order which it was the purpose of the suit to enjoin was made in a proceeding commenced before the Commission on behalf of the Federal Sugar Refining Company, to compel the railroads above named to desist and abstain from paying to Arbuckle Brothers, claimed to be operating what is known as the Jay Street Terminal, certain so-called allowances for floatage, lighterage and terminal services rendered by them to the complainants in connection with sugar transported by them in New York Harbor to and for the complainants, while at the same time paying no such allowances to the said Federal Sugar Refining Company on its sugar.

We substantially adopt as accurate a summary statement made of the subject-matter of the controversy in the brief of counsel for the railroad companies:

"The Federal Sugar Refining Company has a refinery at Yonkers, N. Y., and Arbuckle Brothers have a refinery in the Borough of Brooklyn, New York City. The railroad companies operate what are known as trunk line railroads, extending from New York to western and southern points. In order to receive and deliver freight in New York City they are obliged to transport the same across the waters of New York harbor on lighters by what is called lighterage service, or, when the freight is carried through in railroad cars, on car floats by what is called floatage service.

"At numerous points along the New York City water front within the lighterage limits they have established public stations for the receipt and delivery of freight.

"They have also established boundaries known as 'lighterage limits,' including substantially all of what may be called the manufacturing and commercial portion of the water front of New York City and the opposite shore of New Jersey and within these boundaries they receive and deliver freight at any accessible point on the water front without any additional charge above the New York rates, which are, generally speaking, the same as the rates

to and from the terminals on the New Jersey shore. At 'public' docks open to any vessel, the railroad pays the wharfage; at private docks the shipper or consignee must arrange for the necessary dockage.

"At a number of points in the Boroughs of Brooklyn and the Bronx, the railroad companies or some of them furnish public stations through arrangements made with terminal companies to furnish union public stations and terminal facilities for the receipt and delivery of freight in cars and through freight houses, and for the transportation of such freight between such terminal stations and the railroad companies' rails on the western shore of the harbor, all of which is done for and in the name of the railroad companies under provisions of their tariffs filed with the Interstate Commerce Commission under which their New York rates apply to and from such union public stations.

"One of these public terminal stations, known as the Jay Street Terminal, is owned and operated by William A. Jamison and John Arbuckle, conducting a separate business in that respect as copartners under the name and style of 'Jay Street Terminal' in accordance with the laws of the State of New York. Jay Street Terminal is named as a station of the railroad companies, appellees, in their respective tariffs, and is conducted under contract with the railroad companies like any other freight station, bills of lading being issued from and to it on behalf of the railroad companies and in their names, on the regular uniform form, charges being collected and accounts kept, the Jay Street Terminal performing the entire physical and clerical service and furnishing the necessary docks, freight yard and station buildings and equipment, excepting cars. The Jay Street Terminal also floats or lighters all shipments between the terminal and the rails of the railroad companies on the New Jersey shore. For these services and facilities each railroad company pays to the

Jay Street Terminal an aggregate compensation figured on the freight handled for it, based on the rate of $4^1/_5$ cents per hundred pounds on freight originating at or destined to points at or west of the westerly limits of Trunk Line Territory, so called, and 3 cents per hundred pounds on freight originating at or destined to points east of the westerly limit of Trunk Line Territory. The same amounts per hundred pounds are paid to other terminal companies furnishing similar service at New York.

"The refinery of Arbuckle Brothers, a copartnership composed of William A. Jamison and John Arbuckle, is within two blocks of the Jay Street Terminal, and they truck sugar from their refinery to this terminal and load it into cars at their own expense and deliver it to the Jay Street Terminal and obtain the railroad company's bill of lading for it from the Jay Street Terminal just as other shippers do with other freight.

"The refinery of the Federal Sugar Refining Company at Yonkers, New York, formerly operated by the Federal Sugar Refining Company of Yonkers, is located on the Hudson River, ten miles north of the lighterage limits. The sugar manufactured at this refinery and shipped over the lines of these appellees is loaded onto lighters of the Ben Franklin Transportation Company, an independent boat line with which the Federal Sugar Refining Company has made a contract, under which the boat line lighters its sugar to the terminals of the railroad companies for three cents per hundred pounds. The boat line brings the sugar to the terminals of the railroads on the western shore of New York harbor and delivers it to them for rail transportation.

"The Federal Sugar Refining Company's refinery at Yonkers is located directly on the tracks of the New York Central and Hudson River Railroad Company. Over this railroad the rates to the points in the shipping territory of the Federal Sugar Refining Company are with few

exceptions the same as the rates via the lines of the railroad companies. To ship at the New York rate over the lines of the roads the Federal Sugar Refining Company can deliver its shipments to the New York Central and Hudson River Railroad at Yonkers, thence to be transported by that railroad to New York and there delivered to the said railroad companies within lighterage limits. None of these railroads have lines extending to Yonkers. Because of alleged delay in the handling and transportation of shipments via this route, the Federal Sugar Refining Company sometimes prefers to deliver said shipments by lighter to the said railroad companies at their stations on the New Jersey shore of New York harbor.

"Prior to July, 1909, these shipments were carried by the Ben Franklin Transportation Company directly to the rail terminals on the Jersey shore from Yonkers without stop. Since that date the lighters stop en route at Pier 24, North River. The reason for stopping at Pier 24 is found in the decision made by the Commission in case No. 1082, brought by the Federal Sugar Refining Company of Yonkers, the predecessor of the Federal Sugar Refining Company, against the same railroad companies, appellees here (17 I. C. C. 40). The complaint in that proceeding claimed a discrimination against the Federal Sugar Refining Company of Yonkers and in favor of the Jay Street Terminal and the Brooklyn Eastern District Terminal, an incorporated company operating a similar terminal station in another section of Brooklyn, because of the refusal of the railroad companies to pay it the same amounts on account of the lighterage performed by the Ben Franklin Transportation Company from Yonkers to the rail terminals of the railroad company on the western shore of New York harbor as were paid to the two terminal companies above named on account of the various services performed and terminal facilities furnished by them in connection with the transportation of sugar shipped by

Arbuckle Brothers and the American Sugar Refining Company respectively. This complaint was dismissed because the extension of the lighterage limits in New York harbor of the railroad companies was a matter of business discretion, and that the Commission had no authority to require such extension beyond the then prescribed boundaries, and that the Federal Sugar Refining Company, being located outside of the prescribed lighterage limits, was not subjected to unlawful discrimination by reason of the practice of the railroad companies in affording free lighterage on shipments originating at a distance to points within said lighterage limits while refusing to so afford on shipments of the Federal Sugar Refining Company.

"As a result of this decision of the Commission the lighters of the Ben Franklin Transportation Company were stopped en route from Yonkers at Pier 24, North River, where certain formalities with reference to shipping orders were had for the purpose of making it appear as a matter of law that these shipments were made not from Yonkers, but from Pier 24, North River, a point within lighterage limits. A new complaint was filed with the Commission, setting forth the same grounds of discrimination as the prior one, but on the theory that the decision of the Commission did not apply because the shipments of the Federal Sugar Refining Company were now lightered from Pier 24, a point within lighterage limits and not from Yonkers, the Commission held as a matter of law that the stoppage of the lighters of the Ben Franklin Transportation Company for instructions at Pier 24, differentiated the case from the former one and made the following order:

"'It is ordered that the above-named defendants (the appellees) be and they are hereby notified and required to cease and desist on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain from paying such allowances to Arbuckle Brothers

on their sugar, while at the same time paying no such allowance to said complainant (Federal Sugar Refining Company) on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce.'

"The so-called 'allowances' referred to in this order are a part of the payments making up the compensation of the Jay Street Terminal, figured at the rates of three cents and $4\frac{1}{5}$ cents per hundred pounds as above described."

This is the order the enforcement of which was the subject-matter of the controversy in the court below.

The United States, the Interstate Commerce Commission and the Federal Sugar Refining Company promptly filed motions to dismiss the petition and the intervening petition of the Jay Street Terminal upon the ground of want of equity and because the order of the Commission was an adjudication of matters of fact as to which its judgment was conclusive. The petitioners, on the other hand, applied for an injunction *pendente lite* suspending the order of the Commission until the final determination of the action. The motions to dismiss were denied. On the same day, the motion for a temporary injunction—which had been heard upon the petition and intervening petitions and affidavits submitted by petitioners in support of the averments of the petition and intervening petition—was granted, and the assailed order "and its force and effect" was suspended until the further order of the court. This appeal was then taken.

There was clearly a right in the court below to entertain jurisdiction of the petition and to determine whether the affirmative order of the Commission was entitled to be enforced. There was clearly also power in the court to allow a preliminary injunction, since that authority is conferred in express terms by § 3 (208) of the act. And

the right to appeal from such an order is also in express terms conferred by § 2 (210) of the act.

It is urged on behalf of the United States and the Interstate Commerce Commission that, wholly irrespective of the merits of the petition, the order granting the interlocutory injunction must be reversed because of what is insisted to be the express requirements of the act imposing the duty on the Commerce Court or a judge of that court if a restraining order is granted under the conditions in the statute to state the facts from which it is found that irreparable injury would arise if a restraining order were not allowed. The section containing the provision relied upon is as follows:

"That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the Commerce Court otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the

order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application."

Without ambiguity we think the statute contemplates three classes of orders: First, a temporary restraining order staying in whole or in part the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the suspensive order, to be allowed by the court or a judge thereof; second, a preliminary injunction, that is, an injunction *pendente lite*, which, to quote the words of the statute, may be granted by the court to "restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit;" third, in the nature of things a perpetual injunction upon the entry of the final decree. The order in this case, made after notice and hearing, suspending the force and effect of the order of the Commission until the further order of the court, was obviously an exercise of the power conferred to grant a preliminary injunction or injunction *pendente lite* and not of the power to allow a temporary restraining order embraced in the first of the classes stated. As we think it clear that the requirements of the statute relied upon respecting the statement of facts as to irreparable damages relate only to the first class of cases, that is, the power to issue a temporary restraining order, we hold the objection to be without merit.

This brings us to consider the scope of our reviewing authority under the right conferred by the statute to appeal from the allowance by the court below of a preliminary injunction or injunction *pendente lite*. To determine this question requires a consideration of the nature and character of the powers which the court had a right to

exert over the subject-matter presented to it by the petition filed to perpetually enjoin the enforcement of the order of the Commission.

We have determined in the *Procter & Gamble Case, ante,* p. 282 that the Commerce Court was but endowed in considering whether an affirmative order of the Commission should be enforced on the one hand or set aside and declared non-enforcible on the other with the jurisdiction and power existing at the time that act was passed in the Circuit Courts of the United States. And as, at that time it was conclusively settled that the courts had only authority to reëxamine the findings of the Commission as to subjects like the one here under consideration, for the purpose of ascertaining whether the action of the Commission was repugnant to the Constitution, in excess of the statutory powers conferred upon it, or manifested such an abuse as to be equivalent to an excess of authority, it clearly results that the court below was likewise limited in passing upon the petition before it in this case. This being true, it is also necessarily true that virtually the sole authority of the court below was in a sense confined to determining questions of law arising upon the case as presented on the face of the pleadings. Under the general principles of equity, where a court is called upon to decide whether it will allow a preliminary or *pendente lite* injunction the duty arising requires it to be determined whether on the face of the papers presented there is such an equitable cause of action presented as justifies the issue of a preliminary injunction to preserve the status pending the suit, that is, to afford an opportunity for a trial of the issues presented. Necessarily it is true also that where an appeal is allowed from an order granting a preliminary injunction the reviewing court is put to the duty of determining whether on the face of the papers the court below erred as a matter of law in granting the preliminary injunction. Do these principles apply to the case before

us, is then the first consideration. The result of holding that they do will inevitably cause the expunging from the act of the express authority conferred to issue a preliminary injunction, since viewed under the general principles of equity the criteria by which to determine the rightfulness of such an order in view of the nature and character of the jurisdiction of the Commerce Court is exactly and exclusively the same criteria by which the rightfulness of a final decree of that court issuing a perpetual injunction in conformity to such decree would require to be tested. Our duty, however, is not to destroy the law but to enforce it, and in doing so to seek to discover the intention of the lawmaker, the wrong intended to be prevented and the remedy designed to be afforded by the enactment of the statute. Coming to consider the statute for this purpose, we have pointed out in the *Procter & Gamble Case* that the great remedy intended to be accomplished was the concentration in a single court of the power to consider the rightfulness of enforcing or setting aside orders of the Commission; that to prevent unnecessary delays the limitations as to restraining orders and their duration and the hearing which is commanded as to irreparable injury was enacted. It must therefore in reason be that the power to issue a preliminary injunction was recognized and preserved so as to afford the court the proper time for deliberation and consideration of the questions to be decided by the Commission instead of compelling that body virtually *eo instante* upon the presentation of a petition to reach a final conclusion. And it would seem also to be the case that the right to appeal from such an order was given as a safeguard against a possible abuse of discretion by an unwarranted, arbitrary and unreasonable exercise of the power conferred. In other words, we think that the enlightened purpose of Congress was that the court which it created, in the exercise of the important trusts confided to its authority

and where occasion required it as a consequence of the gravity and complexity of the legal questions which might arise, should be afforded ample opportunity for due consideration and ripe judgment and that it was not intended to compel precipitate, and perhaps ill-considered, action.

Coming to consider the case presented in the light of these principles, in view of the doubt which existed as to the scope and effect of the powers conferred upon the Commission, as shown by the decision of the court in the *Procter & Gamble Case*, of the nature and character of the subject-matter here under consideration and its importance, of the action of the Commission had on that subject prior to the making of the order of the Commission which was assailed by the petition, and especially of the diversity of opinion which existed among the members of the Commission on the subject, we think there is no room for saying that the preliminary injunction issued was in excess of the power conferred upon the court, because of the plain want of necessity for it resulting from the obvious nature and character of the legal questions as to which the judgment of the court was invoked in consequence of the filing of the petition calling for the exertion of the authority conferred upon it by Congress.

It is not disputable that although the right to appeal to this court from an order like the one here in question is conferred, yet obviously the purpose which must have caused the creation of the Commerce Court must have been the desire to interpose between the action of the Commission and this court an intermediate tribunal, having the powers which the statute delegates to it. Our duty is to give that purpose effect and to uphold the lawful authority of the court, without deviation and yet without hesitancy where there has been an abuse of discretion to correct it in the completest way. But as this case manifests no such abuse, our duty is not to reverse the action of the court but to remand the case so that

there may be an opportunity to dispose of it on the merits in the forum selected by Congress for that purpose. Of course, in saying this, we must not be understood as deciding or in any way implying that the duty would not exist to examine the merits of a preliminary order of the general character of the one before us in a case where it plainly in our judgment appeared that the granting of the preliminary order was in effect a decision by the court of the whole controversy on the merits or where it was demonstrable that grave detriment to the public interest would result from not considering and finally disposing of the controversy without remanding to enable the court below to do so.

Affirmed.

END

OF

CASE